IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-405

JAMES C. GABRIEL, *Pro Se*, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for Himself,

Plaintiff-Appellant, Pro Se,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY (THREE-JUDGE COURT)

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY (THREE JUDGE COURT)

JURISDICTIONAL STATEMENT

Appellant James C. Gabriel, Pro Se, appeals from the Opinion of the Three Judge District Court, District of New Jersey in Trenton, dated April 20, 1976, before Honorable Judge Hunter, Circuit Judge, Whipple and Fisher, District Judge (Appendix C) in Civil Action 74-471 who af-

firmed the findings and decision of the Commission without first ordering the I.C.C. to evaluate my Class B equity bearing common stocks according to the MoPac I.C.C. (Appendix I) "Agreed Systems Plan" of Reorganization or Charter, 290 I.C.C. 477 to find the real true value of my Class B common for a fair exchange on a value for value exchange basis into the new MoPac Common shares of my Class B according to the Fifth Amendment "due process of law."

Judgment dated May 4, 1976 was issued by "the Court having considered all of the documents filed as well as the briefs and oral argument of counsel and the court having filed an opinion on April 20, 1976 and for good cause shown, ordered and adjudged that final order of the Interstate Commerce Commission herein be and the same hereby is affirmed without costs." Filed May 6, 1976 (Appendix B).

The Court below had denied my suit for a due process of law evaluation of my Class B equity bearing common stocks after having considered my brief on the merits of the MoPac case, dated February 3, 1976, in which I had asked the Court since the beginning of my MoPac case No. 74-471 to order the I.C.C. to evaluate my Class B equity bearing common shares according to the MoPac I.C.C. Agreed System Plan of 1954-1955, 290 I.C.C. 477, pages 492, 597-600, 624, 625 and 665 or MoPac Charter. Even though the majority of Class B stockholders may have voted in favor of the "Plan of Recapitalization" at $2,450 value per Class B, but plaintiff is a dissenter who requests an evaluation of his Class B common according to due process of the 5th amendment. It is unconstitutional to force plaintiff to accept a "Recapitalization Plan" of MoPac at $2,450 per Class B, but plaintiff requests the court to order the

I.C.C. to re-evaluate his Class B stocks according to 290 I.C.C. 477 to find its real full value in order to exchange his Class B for new common of the recapitalized MoPac on a value for value exchange basis, equal value exchanged for equal value received.

The lower court had affirmed the order of I.C.C. Finance Docket #27346, Decided December 6, 1973, granting authority to MoPac under Section 20 of this Act, to issue new securities without first ordering the I.C.C. to evaluate Plaintiff's Class B equity shares according to the I.C.C. "Agreed System Plan" of Reorganization or Charter to find Class B, real true value.

MoPac's Charter 290 I.C.C. 477 is a law of the United States that must be enforced in order to find my Class B equity shares' real true value for a fair exchange of my Class B for new MoPac common stocks on a value for value exchange basis into the new MoPac common which is close to $22,500 per Class B value, made up of $349 million in Retained Income and $545 million in property values, including land and land mineral rights or a total of $894 million for $39,731 shares of Class B, as of December 31, 1972, and not the mere $2,450 per Class B given by Mississippi River Corporation in a "Settlement Agreement" dated as of Dec. 18, 1972, by and between Alleghany Corporation, MoPac and Mississippi River Corp. for the purchase of Alleghany's 53% control of Class B. Alleghany had been told to divest itself of its Class B by the I.C.C. (See Alleghany Corp. Control and Purchase Jones Motor Co., Decided 1/17/70, #MC-F-10444 p. 339 and 350) (Appendix J), in order to remain as a motor carrier, by having purchased Jones Motor Company, under the jurisdiction of the I.C.C.

to save penalty I.R.S. taxes amounting to millions of dollars yearly, and at the same time to be outside the jurisdiction of the S.E.C. and its Federal Rules on securities. Alleghany controls Investors Diversified Services, Inc., a $7 billion Mutual Funds Investment Company, and being outside the S.E.C. and its federal rules must be of a great advantage to Alleghany.

Appellant Gabriel has been fighting for a due process of law evaluation of his Class B MoPac equity bearing common according to his Constitutional rights under the 5th Amendment, since the idea of a "Plan of Recapitalization" came into being. Appellant voted against the "Settlement Agreement" or "Plan of Recapitalization" at the MoPac Stockholders Special Meeting on June 15, 1973 in Saint Louis, having personally attended the Special Meeting. All appellant wanted was a due process evaluation of his Class B to get value for value surrendered for new MoPac common equity shares in the Recapitalization.

Appellant attended the I.C.C. Hearing in Washington, D.C., September 17 to September 20, 1973, Finance Docket #27346, and his argument in the proceedings was for due process evaluation of his Class B common equity bearing shares.

Appellant filed a complaint on April 3, 1974, and an amended complaint at the United States District Court, District of New Jersey, Civil Action #74-471, for Review of Administrative Action of the I.C.C., Finance Docket #27346, to issue new securities under a Plan of Recapitalization by MoPac under Section 20a, which is being done without a due process of law evaluation for the true value

of my Class B equity bearing common stocks, that this Recapitalization takes away 61% of my Class B equity and retained income, in addition to huge property values in lands and in mineral rights that belong to my Class B stocks, and that my Class B equity bearing common should be evaluated "in accordance to the Missouri Pacific I.C.C. Agreed Plan of Reorganization of 1954-1956." This Agreed MoPac Plan of Reorganization is a law of the United States because it was confirmed by the I.C.C. in 1954 and certified to the United States District Court in Saint Louis, which in turn confirmed the Agreed Plan and certified it to the I.C.C. making the Agreed Plan a law of the United States, and this law of the United States must be enforced.

The I.C.C. Division 3 of the Commission in its Opinion of Service, Dated December 14, 1973, effective date December 14, 1973, Finance Docket #27346, when it granted authority to MoPac to issue new securities under Section 20a, itself admits the loss of 61% of B values, as follows:

> "And it is not disputed, that should the new preferred shares be converted into new common as contemplated in this plan the equity position of the Class B stockholders would be reduced from 61½% to 25½%."

This admission by Division 3 of the Commission shows that the value of Class B was not arrived at through due process of law. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented which require plenary review.

Orders and Opinions Below

Notice of Appeal to the Supreme Court of the United States of America seeking to get a due process of law evaluation of his Class B equity bearing MoPac Common shares according to the Constitution of the United States, filed July 19, 1976 is attached hereto as Appendix A.

The May 6, 1976 Order and Judgment of the Three-Judge District Court below denying Appellant's suit requesting a due process of law evaluation of his Class B equity bearing Common MoPac stocks according to the MoPac-I.C.C. "Agreed System Plan" of Reorganization of 1954-1955 or MoPac Charter, 290 I.C.C. 477 to find the real true value of Appellant's Class B shares for an exchange of his Class B equity bearing shares for new Common MoPac shares on a value for value basis is unreported as far as Appellant knows. A copy is attached hereto as Appendix B.

This Order was preceded by an Opinion, dated April 20, 1976 is unreported as far as Appellant knows. A copy of aforesaid Opinion is attached hereto as Appendix C.

A copy of the Court's Letter Opinion denying Appellant's Motion of June 9, 1976 is dated June 9, 1976, and is attached hereto as Appendix E.

A copy of the Assistant United States Attorney, Mr. Ronald L. Reisner, Esq., letter to Honorable Clarkson S. Fisher, United States District Judge to sign proposed orders within 10 days in accordance with the memorandum of the Court dated May 29, filed June 2, 1976 and the Letter Opinion of the Court dated June 9, 1976 is attached hereto as Appendix F. The signed proposed orders were signed June 21, 1976, attached as Appendix G, and on

June 29, 1976, attached as Appendix H. These Orders are unreported as far as Plaintiff Pro Se knows.

Copy of a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., in the 8th day of July, 1966. *Mississippi River Fuel Corp., et al.* v. *Rose Slayton, et al.*, No. 17,836, U.S. Ct. of Appeals, 8th Cir. (F. D. No. 22951).

Voted *not* to authorize the filing by the General Counsel of a brief *amicus curiae* in the above-entitled court case; Chairman Bush voting to direct the General Counsel to file the aforesaid brief in support of the petition for a writ of certiorari. Appendix S.

Copy of Finance Docket #9918, Missouri Pacific Railroad Company Reorganization—290 I.C.C. 477, pages 477, 492, and 665. Appendix T.

Copy of Alleghany Corp. control and purchase Jones Motor Co., Inc., No. MC-F-10444. Appendix U.

Jurisdiction of This Court

1. The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. 1253 to review an order of the Three-Judge District Court on direct appeal.

2. Jurisdiction of the District Court below was instituted pursuant to provisions of U.S. Code Title 28, Sections 1326, 1398, 2284, 2321, 2325, and Title 5, Section 1009 which confers jurisdiction upon the Three-Judge Court of the United States District Court, District of N.J.

3. Jurisdiction is also conferred by the Constitution of the U.S. It is in violation of the Fifth Amendment on due process of law not to evaluate any Class B equity bearing shares according to 290 I.C.C. 477 to find Class B real true value. It is also a violation of Article 1, Section 10 of the Constitution. Not to first evaluate Class B under due process. Article 1, Section 10 states as follows: No State shall * * * pass any * * * ex post facto law, or law impairing this obligation of contracts * * *." Class B should first be evaluated under due process of law according to the "Agreed System Plan" of Reorganization of 1954-1955 or MoPac Charter, 290 I.C.C. 477, which is a contract for MoPac securities and it must be enforced. Not to first evaluate Class B under due process as above before using Section 20a of the Act, is against Article 1, Section 10, because it is impairing the obligation of contracts, or the MoPac Charter, which is the contract.

Not to first evaluate Class B under due process of law before recapitalization takes place is against the 14th Amendment— Also: "nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Not to first evaluate Class B under due process of law is also against the 16th Amendment in this case. The 16th Amendment must be enforced by first getting a due process of law evaluation of my Class B shares so as to arrive at the higher value for Class B shares. According to the due process evaluation of Class B there will come an addition $615 to $795 million value accruing to Class B. Under the "Recapitalization Plan," between $615 to $795 million

values are being transferred from Class B equity shares to the Class A $5 pfd. $100 value stocks when the Class A $5 pfd. is converted into the convertible pfd., and the convertible pfd. is later converted into the new MoPac common stocks. Out of all these values transferred from Class B to class A $5 pfd., Mississippi River Corp. is favored by an increase of over $400 million values from Class B equity bearing common to her 62% control of Class A $5 pfd., for which over $62 million in taxes is owed by Mississippi to the I.R.S. for the Class B values transferred from Class B to her Class A $5 pfd. when the Class A $5 pfd. is finally converted into the new MoPac common of the Recapitalized Company.

This MoPac Civil Action Case #74-471 was originally instituted in the United States District Court, District of New Jersey. The original complaint was filed on April 3, 1974 for Review of Administrative Action of the Interstate Commerce Commission, Finance Docket #27346, with Amended Complaint to supplement the original complaint filed May 7, 1974.

In attending the I.C.C. Hearings in Washington, D.C. Sept. 17 to 20, 1973, I pleaded to the I.C.C. to enforce their MoPac I.C.C. "Agreed System Plan" of Reorganization or MoPac Charter of 1954-1955, 290 I.C.C. 477, which is a law of the United States. This 290 I.C.C. 477 calls for a due process of law evaluation of Class B equity bearing common stock. This due process evaluation gives Class B a Retained Income of $349 million and property values of $545 million or $894 million total for MoPac's 39,731 shares of Class B, as of December 31, 1972. By not first evaluating Class B under due process of law to find its true value,

the I.C.C. by the use of Section 20a of the Act is forcing all Class B stockholders to give up their $22,500 value Class B, for a value of only $2,450 per share of Class B. Division 3 is ignoring my Civil Rights which are secured by the Constitution of the U.S.

Commission Division 3 states as follows on page 64 of Finance Docket #27346, December 6, 1973 MoPac decision to issue new securities: "Moreover the Commission's jurisdiction under 20a is plenary and exclusive and independent of any other Federal authority. * * * Since the matter involved in this proceeding comes within the purview of Section 20a, our jurisdiction in the proceeding is supreme * * *." That may be so, but first the I.C.C. should see to it that my Class B stocks are evaluated under due process, and after that the I.C.C. should fulfill their constitutional duty under Section 20a of the Act. Section 20a(2)(a) does not allow such goings on against the investing public interest. Congress passed 20a to protect public investors through the I.C.C. policeman in the issuance of railroad securities. On this instant case Division 3 is not obeying its oath of office to protect the public.

Questions Presented

Regarding the 16th Amendment to the Federal Constitution, doesn't it also apply to big corporate structures like Mississippi River Corporation which has had a benefit of over $400 million values and has not paid taxes on it, simply by converting her 62% holding of Class A $5 pfd. $100 value stocks into new equity bearing MoPac common stocks by Commission Division 3 permission under Section 20a without first evaluating Class B equity bearing com-

mon under due process of law to find Class B's real true value according to the MoPac's Charter—290 I.C.C. 477, so that dissenter Class B holders like myself could get equivalent value for my Class B as the values I surrendered by converting my shares of Class B into the new common?

Answer to Question No. 1

The 16th Amendment cannot be enforced against Mississippi River Corporation as long as my Class B equity bearing common stocks are not being evaluated under due process of law according to MoPac's Charter—290 I.C.C. 477. Under Section 20a of the Act, it is the duty of the Commission to first evaluate Class B equity common shares under due process of law—290 I.C.C. 477, before allowing the $5 MoPac preferred to become converted into new common. Only that due process will solve this MoPac case constitutionally.

The I.C.C. is trying to stop me from getting due process of law evaluation for my Class B by trying to dismiss my Jurisdictional Statement to the Supreme Court October Term, 1975, #1815. I am trying to use Rule 19 Joinder of persons needed for just Adjudication to get the I.R.S. into my MoPac case in order that the I.R.S. becomes enabled to use their law expertise and their command of respect everywhere, to help me get a Federal Court order, ordering the I.C.C. to evaluate my Class B under due process, according to 290 I.C.C. 477 or MoPac Charter. This higher valuation of Class B will enable the Internal Revenue Service to collect over $100 million capital gains taxes from Class A $5 pfd., $62 million of this coming from Mississippi River Corporation.

Reading paragraph 2 of page 1 of the lower Court's Opinion (Appendix B) dated April 20, 1976, wherein the following is stated:

"The terms of the plan of recapitalization have previously been settled and approved and reported in a comprehensive opinion and judgment by Judge Weinfeld in a class action brought by Class B stockholders of MoPac, to which class plaintiffs here belong," don't I have a constitutional right to ask the I.C.C. for a due process of law evaluation of my Class B equity bearing common stocks according to the 5th Amendment "due process of law" by following the MoPac I.C.C. "Agreed System Plan" of Reorganization or MoPac Charter, 290 I.C.C. 477 in a "Plan of Recapitalization" under Section 20a without the lower Court trying to confuse the issue of my suit that I have in that court which is for that honorable lower Court to issue a court order, ordering the I.C.C. to evaluate my Class B stocks under due process of law according to the MoPac Charter of 1954-1955, without the lower Court trying to shift my present suit into another case of Hon. Judge Weinfeld's Opinion and Judgment of a class action suit that has nothing to do with me nor with my present case against the I.C.C. for a due process of law evaluation of my Class B?

Answer to Question No. 2

Plaintiff's case has nothing to do with Judge Weinfeld's class action case because this plaintiff was never a member of any class action, either on dividends or recapitalization. He voted all of his Class B shares against the "Plan of Recapitalization" or "Settlement Agreement" at the June 15, 1973 Section MoPac Stockholders' Meeting in Saint Louis and he has been fighting in the courts since then for a due process of law evaluation of his Class B shares under MoPac's Charter.

Plaintiff has a constitutional right under the 5th Amendment to ask the I.C.C. through a Federal Court Order ordering the I.C.C. for a due process of law evaluation of his Class B equity bearing common shares because the I.C.C. used Section 20a of the Interstate Commerce Act to grant authority to MoPac to issue new securities without the I.C.C. first evaluating Class B under due process, according to 290 I.C.C. 477 to find its real true value, but instead, the I.C.C. said $2,450 value per Class B was "Fair Value" (see p. 58 of Finance Docket #27346, I.C.C. Dec. 6, 1973 Decision) by following Judge Weinfeld's "Fair Value" statement regarding Class B.

If it is as stated on page 9 of Division 3 in their December 6, 1973 MoPac Decision, Finance Docket #27346, that: "It is apparent that MoPac is in a relatively healthy financial condition and that it has a reasonably favorable margin for future contingencies," the fact that MoPac is in a healthy condition, does that give Commission Division 3 a legal right to operate on MoPac under Section 20a of the Act and take away the majority values from my Class B equity bearing common and transfer them to the Class A $5 pfd. $100 value stock by allowing this $5 pfd. to be converted into a new equity bearing common without first evaluating Class B under due process according to 290 I.C.C. 477?

Answer

Division Commission 3 has no right to take away the values of Class B without giving my Class B its equivalent values for values surrendered in a solvent, prosperous railroad company such as MoPac. To do otherwise is against the 5th Amendment. Even Commission Division 3 admits on page 35 of its December 6, 1973 Decision, Finance Docket #27346 that "it is not disputed, that should the new preferred shares be converted into new common, as contemplated in the plan, the equity position of the Class B stockholders would be reduced from 61½% to 25½%." This is a loss of over 67% of my Class B value. But this does not include the property and land rights or mineral rights values of over $540 million as of December 31, 1972, that belongs to Class B. The Commission Division 3 is acting as if Class B was a stock in a bankrupt company, whereas Class B I believe has earned over $1,000 per share net on an I.C.C. bookkeeping basis in 1974. I believe that Commission Division 3 has acted unjustly and all in favor of MoPac, an Intervening Defendant in my Civil Action #74-471 before the lower Court. By not permitting a due process of law evaluation of my Class B shares, the I.C.C. is not only helping to defraud me out of over $20,000 per Class B in values, but it is also helping to defraud the I.R.S. out of over $100 million on capital gain taxes that the higher Class B value would yield to the I.R.S., $62 million coming from Mississippi River Corporation.

Wood case—*Wood* v. *United States,* 132 F. Supp. 586 (S.D. of N.Y. 1955)

Isn't it against the *Wood* case to allow the conversion of the Class A $5 pfd. $100 value stocks of MoPac into

a cumulative preferred stock in a "Plan of Recapitalization" under Section 20a of the Act, and then one year later convert the $5 cumulative $100 value preferred stocks into new equity bearing common stocks, and at the same time convert the Class B equity bearing MoPac common into new common, without first evaluating the Class B common under due process of law according to the MoPac I.C.C. Agreed System Plan" of Reorganization of 1954-1955 or MoPac Charter, 290 I.C.C. 477, which is a law of the United States, in order to finding the real true value of Class B equity bearing common for a fair exchange into the new common on a value for value exchange basis?

Answer to Question No. 4

In the *Wood* case it has been brought out that dissenters cannot be held in any class action because it is against the 5th Amendment of due process of law in a solvent railroad under the Interstate Commerce Act as passed by Congress. It is against the public interest, which is the investing public in railroad securities.

Question No. 5

If the Interstate Commerce Commission is fair and equitable and for the public interest, which is the investing public in railroad securities, why did the Commission at a General Session of the I.C.C. on the 8th day of July, 1966 in re: *Mississippi River Fuel Corp., et al.* v. *Rose Slayton, et al.,* No. 17,836, U.S. Ct. of Appeals, 8th Cir. (F. P. # 22951) voted *not* to authorize the filing by the General Counsel of a brief *amicus curiae* in the above entitled case;

Chairman Bush voting to direct the General Counsel to file the aforesaid brief in support of the petition for a writ of certiorari. (See Appendix K.)

A true copy.

Secretary of the Interstate
H. NEIL GARSON
Commerce Commission

ANSWER TO #5

This shows that the Commission as a whole had been biased against the Missouri Pacific Railroad Class B equity bearing common stockholders' interests on July 8, 1966. It seems to me that the Commission is still biased against Class B stockholders from what they have done against the interests of little people in railroad common stocks.

Statute Involved

Section 20a (February 25, 1920, amended August 9, 1935, August 2, 1949) (49 U.S.C., Section 20a) of the Interstate Commerce Act.

Section 20a(2)(a). The Commission shall make such an order only if it finds that such issue or assumption (a) is for some lawful object within its corporate purposes, and compatible with the public interest which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

CONSTITUTIONAL PROVISIONS

ARTICLE I

Section 10. "No state shall * * * make any ex post facto law, or law impairing the obligation of contracts, * * *."

ARTICLE V

No person shall be * * * deprived of life, liberty, or property without due process of law; * * *."

ARTICLE XIV

Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

Statement of the Case

Appellant James C. Gabriel, Pro Se, is a Missouri Pacific Railroad Class B equity bearing common stockholder who is suing for the Federal Courts to issue an order, ordering the Interstate Commerce Commission to evaluate Appellant's Class B equity bearing common stocks under due process of law to find their real true value according to the MoPac I.C.C. "Agreed System Plan" of Reorganization of 1954-1955 or MoPac Charter, 290 I.C.C. 477, a law of the United States that must be enforced, in order to find Class B's real true values, so that Appellant may become enabled to exchange his Class B stocks for new MoPac common shares of the Recapitalized Missouri Pacific Railroad, on a value for value basis. A due process of law evaluation is his lawful right under the Constitution of the United States,

and also under the MoPac I.C.C. "Agreed System Plan" of Reorganization of 1955 or MoPac Charter which gives the real true value for the Class A pfd. $100 value shares, and the Class B equity bearing common shares which are awarded "only a small amount in actual par value," but are made "the residuary beneficiary of any future prosperty the property may enjoy." (See p. 624 and 625-290 I.C.C. 477.)

The MoPac Class B original suit was commenced by *Betty Levin* v. *Mississippi River Corporation* in 1967, which was later joined by Alleghany Corp. and Robert Le Vasseur for better dividends for the MoPac Class B equity bearing common stockholders. It was later made into a class action with respect to dividends by Honorable Frederick van Pelt Bryan U.S.D.J., Southern District of New York (67 civil 5095) on October 9, 1968, that Class B holders were not getting enough dividends on their Class B. No intervenors were permitted into the case after December 20, 1968. See U.S.D.C. S.D. of New York Filed October 10, 1968-67 Civ. 5095 Notice of Settlement Order Betty Levin et al., Plaintiffs against Mississippi River Corporation et al., Defendants.

On December 18, 1972, a "Settlement Agreement" was made "dated as of December 18, 1972 by and between Alleghany Corporation, MoPac and Mississippi River Corporation," to sell to Mississippi River Corp. all of the 53% holdings of Alleghany's Class B equity MoPac shares at $2,450 value per Class B, or for about $97 million for the entire 39,731 shares of Class B. This price was so cheap that Mississippi wanted all the Class B at that price and used the Section 20a of the Interstate Commerce Act for

a "Plan of Recapitalization" to take the Class B, equity shares at a fixed price and convert all of her 62% Class A $5 preferred $100 value shares into new equity bearing common based upon a value of $2,450 per Class B without first making a due process of law evaluation to find Class B real true value, which under due process is about $22,500 per Class B which is according to MoPac's Charter or "Agreed System Plan" of Reorganization of 1954-1955, 290 I.C.C. 477, which would give to the Class B equity common shares about $22,500 per share value, made up on $349 million Retained Income and $545 million in property values as of December 31, 1972, or a total of about $894 million for the 39,731 Class B, all these values belonging to Class B MoPac common.

The "Plan of Recapitalization" called for the conversion of the 1,860,000 shares of Class A $5 pfd. into new equity common by adding to the $5 pfd. over $615 million to $797 million values by transferring these values from Class B and giving them to Class A $5 pfd., thereby increasing the Class A $5 pfd. $100 value stocks to a value of about $430 per share simply by converting the Class A $5 pfd. into a new $5 convertible preferred and then converting that convertible preferred into the new MoPac equity bearing common stocks. That 1,860,000 Class A $5 pfd. became through conversion 1,860,000 shares of MoPac $5 cumulative preferred, which in turn were converted into 1,860,000 shares of new equity bearing common, having now a new status by now having a claim on all of the Retained Income, lands, properties, mineral rights, worth over $800 million dollars that formerly all belonged to the Class B equity bearing common. This was all done on the basis of the Class B given a value of only $2,450 per share by Com-

mission Division 3 without a due process of law evaluation of Class B by Division 3 according to the MoPac I.C.C. "Agreed System Plan" of Reorganization of 1954-1955 or MoPac Charter, 290 I.C.C. 477, under the due process evaluation would have given Class B a value of about $22,500 per share if Commission Division 3 had followed the MoPac Charter or Contract of 1953-1955. Instead of doing that, Commission Division 3 simply said that $2,450 value per Class B was "fair value" (see p. 58 Finance Docket #27346, Order of December 6, 1973 by the Commission) by following Hon. Judge Weinfeld's order that $2,450 per Class B was "fair value." On page D-5 of the MoPac May 8, 1973 Prospectus to its stockholders, Hon. Weinfeld states as follows: "The Court's role is a more delicate one which requires a balancing of likelihoods rather than an actual determination of the *facts* and *law* in passing upon whether the proposed settlement is fair, reasonable and adequate to the Class B stockholders and MoPac."

This shows that even Hon. Weinfeld was not basing his decision on "facts and law." So why did the I.C.C. Division 3 of the Commission follow Hon. Weinfeld?

This unorthodox, unconstitutional and unlawful method of evaluation of other peoles' properties without due process, reduces the value of Class B equity bearing common shares from 82½% to 24½% ownership of the Missouri Pacific Railroad, and increases Class A $5 pfd. value from 17½% to 75½% ownership of MoPac, or from $186 million to about $801 million. At the same time it reduces Class B to $97 million value from $894 million value. But the most important part is that the Class A $5 pfd. $100 value stock has now become an equity bearing common, by not having a due process law evaluation of Class B.

But this transfer of values from Class B equity bearing Common to the Class A $5 pfd. of between $615 million to $797 million values require taxes to be paid to the U. S. Government I.R.S. of over $100 million by Class A $5 pfd., 62% of which is owned by Mississippi River Corporation, which benefits over $400 million in Retained income and property value that Commission Division 3 helped its friends in Class A $5 pfd. get in this so-called "Plan of Recapitalization" converted by Mississippi which controls Mo-Pac. This means that Mississippi River Corp. owes the I.R.S. over $62 million in Capital Gains Taxes according to the 16th Amendment to the Federal Constitution. That is the reason why the ICC Division 3 does not relish or wants a due process of law evaluation of my Class B equity bearing Common because it would raise the values of Class my B to about $22,500 per share which would mean that Mississippi would have to pay up these taxes to the I.R.S. The I.C.C. is a defendant in my MoPac Case in the Federal District Court, District of New Jersey, Civil action #74-471, and I am suing the I.C.C. in order to get a due process of law valuation of my Class B equity share for a real true value of my shares for a value for value exchange of my Class B for the new MoPac Common.

Alleghany Corporation was not really representative of the minority Class B holders as she was portrayed to be by the Weinfeld Court and by the I.C.C. Alleghany had a tax advantage in disposing of its Class B at an arbitrary low price value of $2,450 per share and Alleghany was pressured by the I.C.C. to dispose of its Class B in order

to be allowed by the I.C.C. to remain as a motor carrier under I.C.C. jurisdiction because Alleghany owns Jones Motor Co. and saves several million dollars annually in I.R.S. penalty taxes by remaining as a motor carrier under the I.C.C. jurisdiction. Besides, Alleghany controls Investors Diversified Services Inc., a $7 billion Investment Trust Complex and as a motor carrier Alleghany is not under the S.E.C. Federal law supervision in their investments. Some favoritism under the I.C.C. jurisdiction. The older background facts are very important and essential for a full understanding of this Jurisdictional Statement. (See Alleghany Corp. Control and Purchase Jones Motor Co. # MC-F-10444 in Appendix.)

Not to give Class B a due process of law evaluation by the Interstate Commerce Commission is against the 5th Amendment of due process, and Article 1, Section 10 of the Constitution—"No state shall * * * pass any ex post facto law, or law impairing the obligation of contracts, * * * ." The I.C.C. by using Section 20a is impairing the MoPac Charter, 290 I.C.C. 477 or "Agreed System Plan" of Reorganization of 1954-1955 which is a contrast, and Class B must be evaluated under due process of law first according to the "Agreed System Plan." The law is on the side of Class B shares and the law must be enforced for the sake of justice. In my opinion, the decision of the Commission Division 3 is based strictly on the basis of MoPac's original application and supporting document. Division 3 placed no weight on my testimony either at the I.C.C. Hearing on September 17 to 20, 1973, Finance Docket # 27346, in Hearing Room A before the I.C.C.'s Honorable William J. Gibbons, Administrative Law Judge or on my brief dated October 15, 1973 to the I.C.C. asking the I.C.C.

to give my Class B shares a due process of law evaluation. Nor did the I.C.C. pay any attention to my January 14, 1974 Petition to the I.C.C. for Reconsideration for a due process of law evaluation of my Class B shares according to 290 I.C.C. 477 "Agreed System Plan" or MoPac Charter as I brought it out on pages 13 and 14 that in a due process evaluation my Class B was worth around $25,000 per share, based upon its Retained Income of $349 million and $545 million in property values or about $894 million for the 39,731 shares of Class B.

The opinion of Division 3 was written regardless of value appeared in the record of the Hearing Room on the MoPac Class B stocks before Honorable Judge Gibbons. It was simply a matter of what evidence Division 3 wanted to phase the weight on. They apparently completely disregarded my objection to the Commission Division 3's use of Section 20a of the Act before a due process of law of Class B was first made to find out the real true value of Class B equity bearing Common without due process the I.C.C. gave Class B only a small portion of its real value, all for the benefit of Mississippi River Corporation who had concocted the Plan of Recapitalization of 12,450 per Class B. Mississippi River Corp. apparently wants monopoly control of MoPac properties for a small Wall Street clique. Even the I.C.C. says that Class B equity will be reduced from 61½% to 24½% when MoPac's new convertable preferred, which is the former Class A $5 pfd. $100 value stocks, are converted into the new MoPac equity bearing common.

Permission under 20a should not be given by the Commission without first evaluating Class B under due process

of law according to MoPac's Charter, 290 I.C.C. 477, because by doing so it is taking away over $20,000 value of Class B from my Class B shares for the benefit of Mississippi River Corporation. This sort of action by the Commission Division 3 is not "fair, reasonable and in the public interest" and in my interest because it violates section 20a (2)(a) of the Interstate Commerce Act as passed by Congress in 1920 which was supposed to protect the investing public in railroad securities, and not to help harm them.

If what Commission Division 3 says is true, that $2,450 per Class B is "fair value," that it is fair, reasonable and equitable and in the public interest, and the public interest is also the MoPac stockholders' interest, then why is it that the Interstate Commerce Commission fights against me, not to give me a due process of law evaluation of my Class B? Isn't their action and court fight Civil Action 74-471 against my getting the I.C.C. ordered to get my Class B equity shares evaluated under due process of law to find their real true value for a fair exchange of my Class B into the new MoPac common against the Constitution, 5th and 14th Amendment and also Article Section 10 and against Section 20a(2)(a)? Doesn't this action on their part prove that they are not telling the truth?

Plaintiff, Pro Se, prays that this Honorable Court rule to have his MoPac Class B Common Stock which possesses MoPac's equity, be evaluated under due process of law by the I.C.C. according to the MoPac I.C.C. "Agreed System Plan" of Reorganization or Charter of 1954, 1955, which is still a law of the U.S. because it was approved and certified both by the ICC and the Federal District Court of jurisdiction in these proceedings in Saint Louis. It is the sworn

duty of the ICC to obey its own laws that the ICC brought about, and the MoPac "Agreed System Plan" of Reorganization is one of the laws that the ICC brought about.

The Questions Are Substantial

The questions are substantial and require plenary consideration by this Court because the lower Court, the I.C.C., MoPac and Mississippi are violating my constitutional rights in the following way:

1. Plaintiff-Appellant James C. Gabriel, Pro Se has been suing in the Federal District Court of New Jersey in order to get a Court Order, ordering the I.C.C. to evaluate Plaintiff's Class B MoPac Common equity bearing stocks under due process of law to find their real true value according to the MoPac I.C.C. "Agreed System Plan" of Reorganization of 1954-1955 or MoPac Charter, 290 I.C.C. 477. This MoPac Charter is a contract for the value of MoPac securities. Only by due process evaluation of my Class B will I become enabled to get value for value in exchange for my Class B equity bearing common shares for new securities of the Recapitalized MoPac.

This constitutional right was denied by the lower Court which had decided against my Brief on the Merits of the Case. I had asked for a due process evaluation of my Class B shares, but the lower Court evaded the issue of due process of law evaluation and instead stated in their April 20, 1976 opinion on page 1 (see Exhibit C), 1st paragraph that I am a dissatisfied MoPac preferred stockholder. But I am not a preferred stockholder, I am a Class B equity bearing common stockholder, and I am suing to get a due

process of law evaluation of my Class B shares according to 290 I.C.C. 477.

The lower Court has ignored my plea for due process of my Class B, which is I.C.C. duty to evaluate it, but instead entered an Order or Judgment on May 6, 1976 affirming the 20a (see Exhibit B) decision by the I.C.C.

Section 20a was passed by Congress in 1920—in order to protect the railroad securities investing public from issuance of railroad securities by corrupt railroad managements that would defraud these investors with practically worthless stocks. The I.C.C. was set up as policemen in Section 20a of the Act against such issuance of bad securities. But what do we see in this present MoPac case? The Commission Division 3 has ignored its duty to protect the railroad securities investing public by not evaluating my Class B equity bearing common shares under due process, 290 I.C.C. 477 to find their real true value for a value for value exchange of my Class B common into new securities of the Recapitalized MoPac. It is the duty of the I.C.C. to evaluate Class B under due process of law first, before it allows MoPac and Mississippi to exchange my Class B for a value of $2,450 per share, on which $2,450 value per Class B basis Mississippi River was allowed to convert her Class A pfd. $100 value stocks into accumulatives pfd. and later to convert that cumulative preferred stock into the new MoPac equity bearing common stock. How could that I.C.C. be allowed to do this without first giving Class B a due process of law evaluation according to the charter to find the true value basis of Class B in relation to the Class A $5 pfd. MoPac stock values?

To begin with, Class B has a due process of law value of around $22,500 per share and not a value of $2,450 per share which the I.C.C. says is "Fair Value."

Not to evaluate my Class B under due process before recapitalizing MoPac under Section 20a is against the 5th Amendment, and the 14th Amendment, Section 1 of "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is also against Article 1, Section 10, which states: No state shall * * * pass any * ** ex post facto law, or law impairing the obligation of contracts * * *." The MoPac I.C.C. "Agreed System Plan" of Reorganization of 1954-1955, or Charter, 290 I.C.C. 477, is a contract for MoPac securities. Not to evaluate Class B under due process of law as stated above, before executing a "Plan of Recapitalization" by the I.C.C. under Section 20a is not constitutional because it impairs the obligation of the MoPac I.C.C. Charter or MoPac Contract of 290 I.C.C. 477 or "Agreed Sytem Plan." To do so is also against Section 20a(2)(a) because it is against the public interest or investor interest because the Class B equity bearing common stockholders are in this way being defrauded out of over $20,000 value per Class B. Besides, the value given to the Class B by that I.C.C. is $2,450 value as "fair value" or about $97 million for its 39,731 Class B shares instead of its due process of law value of about $22,500 per share or $894 million, is from $615 million to $797 million value less than what the 39,731 shares of Class B are worth, which millions of dollars in values are transferred to the MoPac

Class A $5 pfd. $10 value stocks. With Mississippi River Corporation owning 62% of this pfd., she benefits free over $400 million for which she pays no taxes.

Section 20a Plan of Recapitalization was done primarily under the guidance plan of Mississippi River Corporation, to take advantage of the innocent small Class B stockholders to take away their property without due process under the guise of "Recapitalization." Please help small investors.

CONCLUSION

For the foregoing reasons this Honorable Court has jurisdiction in the matter which presents important and substantial questions requiring plenary review.

The following phrases by Commission Division 3 do not satisfy my constitutional rights to a due process of law evaluation of my Class B equity bearing common stocks according to the MoPac I.C.C. "Agreed System Plan" of Reorganization of 1954-1955, or MoPac Charter, 290 I.C.C. 477:

"that it is the public interest."
"fair and reasonable to all parties."
"Rights of the stockholders are part of the public interest."
"Incumbent upon the Commission to see that interests of minority stockholders are protected."
"Just and reasonable as to those stockholders."

Then suddenly, Commission Division 3 comes out with the hard truth, as follows:

"We hold that the proposed plan is fair and reasonable to all stockholders and otherwise fully complies with the

requirements of Section 20a(2)." This is the way Commission Division take us over for the benefit of their Class A $5 pfd. $100 value stock friends—Mississippi River Corporation which gets its $5 Class A $100 value stocks converted into MoPac equity bearing common, suddenly laying claim to MoPac's Class B Retained Income and Property values worth over $800 million as of December 31, 1972, property which Mississippi receives free. Mississippi which controls 62% of all Class A $5 pfd., receiving over $400 million values free from Class B, not even having to pay any income taxes on this great windfall, thanks to Alleghany, Mississippi and MoPac I.C.C. Division 3 friends who do as they please in that Government agency by not first evaluating Class B under MoPac's Charter before executing their "Plan of Recapitalization" under Section 20a of the Act.

Mississippi is using MoPac which it controls, for its own selfish needs, using a "Plan of Recapitalization" under 20a to take over other small people's property without paying for it at its real true value, but at Mississippi's own price of $2,450 value per share of Class B, at which $2,450 per Class B Mississippi converts her $5 preferred into the new common without first evaluating Class B under due process according to the MoPac Charter, 290 I.C.C. 477.

By this unorthodox method, Commission Division 3 is violating Section 20a(2) of the Act, and violating the 5th Amendment on due process of law, violating the 14th Amendment, Section 1, line 2: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I have a privilege of getting my due process evaluation of my Class B property, but I am not being allowed by the I.C.C. to do so by being deprived of my rights.

The I.C.C. by not evaluating my Calss B under due process first, before executing the Plan of Recapitalization under Section 20a, is violating Article 1, Section 10. The contract in this instance is the MoPac Charter, 290 I.C.C. 477, a contract that the I.C.C. itself made in the MoPac I.C.C. "Plan of Reorganization" in 1954-1955.

The I.C.C. says on page 35 of F.D. #27346 of I.C.C. Dec. 6, 1973 Decision that "it is not disputed, that should the new preferred shares be converted into new common, as contemplated in the plan, the equity position of the Class B stockholders would be reduced from 61½% to 25½%." Therefore, the $2,450 value per Class B given to it by the I.C.C. was not based upon facts and law. Please note, *these figures do not include over $13,000 value per Class B in property.*

This case represents very important matters regarding my rights under the Constitution of the United States, of Article 1, Section 10, the 5th Amendment and the 14th Amendment.

For all of these reasons, this Honorable Court has jurisdiction in this matter which presents important and substantial matters requiring plenary review.

Respectfully submitted,

James C. Gabriel, *Pro Se,*
Plaintiff-Appellant
P.O. Box 94, Sea Girt, N. J. 08750
Telephone (201) 899-6200

Certificate of Service

I, James C. Gabriel, *Pro Se,* Petitioner, do hereby certify that 3 copies of each of the above and foregoing Petitioner's Jurisdictional Statement have been deposited in the United States Mail, postage prepaid, on the 17th day of September, 1976, to the following addressees:

Harold L. Reisner
Assistant U.S. Attorney
Federal Building
Trenton, N.J. 08608

Leon Leighton, Esquire
Milton Rosenkranz, Esquire
6 East 45th Street
New York City, N.Y. 10017

Hanford O'Hara
Office of the General Counsel
Interstate Commerce Commission
Washington, D.C.

John Charles Vaiani
1313 River Ave.
Point Pleasant, N.J.

William R. Wessen
1550 Ocean Ave.
Mantoloking, N.J.

/s/ James C. Gabriel
James C. Gabriel, *Pro Se*
Plaintiff-Appellant

APPENDICES

APPENDIX A

Notice of Appeal

United States District Court
District Of New Jersey

James C. Gabriel, Pro Se, Plaintiff, v. United States Of America and Interstate Commerce Commission, Defendants, Missouri Pacific Railroad Company, Intervening Defendant.		Civil Action #74-471 Notice Of Appeal To The Supreme Court Of The United States Of America For My Above Captioned Case

To: The Clerk Of The United States District Court, District Of New Jersey

Sirs:

The undersigned James C. Gabriel, Pro Se, hereby appeals to the Supreme Court of the United States of America for his above Captioned Case, Civil Action #74-471; Appellant is appealing from each and every order, ruling, letter opinion, memorandum, upon which the judgment or order was based upon. Plaintiff, Pro Se, is seeking to get a due process of law evaluation of his Class B equity bearing MoPac Common shares according to the Constitution of the United States.

ORIGINAL FILED
JUL 19 1976
ANGELO W. LOCASCIO, CLERK

Dated: Monmouth County of N.J.
July 15th, 1976

Respectfully submitted,
James C. Gabriel, Pro Se
James C. Gabriel, Pro Se
P.O. Box 94, Sea Girt, N.J. 08750
Phone (201) 889-6200

Service to: Clerk of the Court, one original and seven copies.

APPENDIX B

Judgment

PLR:kew
74 1380
74 1383
74 1384

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMES C. GABRIEL, Pro Se, JOHN CHARLES VAIANI, Pro Se, WILLIAM R. WESSON, Pro Se, Plaintiffs	:	CONSOLIDATED CIVIL ACTIONS
v.	:	74-471 74-470 74-469
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants	:	JUDGMENT
-and-	:	
MISSOURI PACIFIC RAILROAD COMPANY Defendant-Intervenor	:	

This matter, having been opened to the Court by James C. Gabriel, John Charles Vaiani and William R. Wesson, plaintiffs pro se, in the presence of Jonathan L. Goldstein, United States Attorney for the District of New Jersey, Ronald L. Reisner, Assistant United States Attorney appearing, Thomas E. Kauper, Assistant Attorney General of the United States, John H. D. Wigger, Esquire, appearing, Fritz R. Kahn, General Counsel for the Interstate Commerce Commission, Hanford O'Hara, Esquire appearing, Milton Rosenkranz, Esquire and Leon Leighton, Esquire appearing, and the Court having considered all of the documents filed as well as the briefs and oral argument of counsel and the Court having filed an opinion on April 20, 1976 and for good cause shown;

It is on this 7th day of May, 1976

ORDERED and ADJUDGED that final order of the Interstate Commerce Commission questioned herein be and the same hereby is AFFIRMED without costs.

JAMES HUNTER, III
UNITED STATES CIRCUIT JUDGE

LAWRENCE A. WHIPPLE
CHIEF, UNITED STATES DISTRICT JUDGE

CLARKSON S. FISHER
UNITED STATES DISTRICT JUDGE

ORIGINAL FILED
1976
ANGELO W. LOCASCIO, CLERK

APPENDIX C

Opinion of the U.S. District Court, District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

JAMES C. GABRIEL, Pro Se, JOHN CHARLES VAIANI, Pro Se, WILLIAM R. WESSON, Pro Se Plaintiffs	:	CONSOLIDATED CIVIL ACTIONS
vs.	:	74-471 74-470 74-469
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants	:	OPINION
- and -	:	
MISSOURI PACIFIC RAILROAD COMPANY, Defendant-Intervenor	:	

APPEARANCES: JAMES C. GABRIEL, Pro Se
JOHN CHARLES VAIANI, Pro Se
WILLIAM R. WESSON, Pro Se

THOMAS E. KAUPER, ESQ.,
Asst. Attorney General
By: JOHN H. D. WIGGER, Esq.,

- and -

JONATHAN L. GOLDSTEIN, ESQ.,
United States Attorney,
By: RONALD L. REISNER, ESQ.,
For the United States of America

FRITZ R. KAHN, ESQ.,
General Counsel,
By: HANFORD O'HARA, ESQ.,
For Interstate Commerce Commission,

MILTON ROSENKRANZ, ESQ.,
LEON LEIGHTON, ESQ.,
For the Defendant-Intervenor

BEFORE: HUNTER, Circuit Judge
WHIPPLE and FISHER, District Judges

FISHER, District Judge

Plaintiffs, three disappointed preferred stockholders of the Missouri-Pacific Railroad Company, (hereinafter MoPac), brought this action to set aside and annul an order of the Interstate Commerce Commission which granted authority to MoPac under the Interstate Commerce Act, 49 U.S.C. 20a to issue securities in accordance with a plan submitted to the I.C.C. to recapitalize. Plaintiffs and others had opposed the plan before the I.C.C. Jurisdiction is conferred by virtue of §§1336(a), 1398(a), 2284, 2321-2325, 2401 of Title 28 U.S.C. and §1009 of Title 5. The purpose of the suit is to have this court set aside the determination of the I.C.C.

The terms of the plan of recapitalization have previously been settled and approved and reported in a comprehensive opinion and judgment by Judge Weinfeld in a class action brought by Class B stockholders of MoPac, to which class plaintiffs here belong. Levin v. Mississippi River Corp., 59 F.R.D. 353, (S.D.N.Y. 1973), aff'd. sub. nom. Wesson v. Mississippi River Corp., 486 F.2d 1398 (2d Cir. 1973), cert. denied 414 U.S. 1112 (1973).

Upon reorganization in 1956 under Section 77 of the Bankruptcy Act (11 U.S.C. §205), MoPac, a Missouri corporation, was authorized to issue two classes of stock: Class A (issued to former preferred stockholders) and Class B (issued to former common stockholders). Class A stockholders had certain preferences as to the payment of dividends and in the event of dissolution of the company. Each share of both types had one vote: 1.9 million shares (98%) were held by Class A stockholders, and 40,000 shares (2%) were held by Class B stockholders. Class A holders thus had operational control over the corporation, but on mergers, consolidations or reorganizations involving issuance of additional stock or the alteration of rights of the respective Classes, a majority of each Class was required to approve the action proposed. This situation caused a conflict between the two Classes, a conflict aggravated by the fact that Mississippi River Corporation, (Mississippi), had by 1963 acquired a majority of the Class A shares, while Alleghany Corporation (Alleghany) held a majority of the Class B shares.

In December of 1967 a class and derivative action was commenced on behalf of all Class B stockholders (Alleghany and others) against MoPac, Mississippi,

and three directors of MoPac, to compel the payment of higher dividends, past and future. In that action, Levin v. Mississippi River Corp., 59 F.R.D. 353 (S.D.N.Y. 1973) aff'd. mem. 486 F.2d 1398 (2d Cir. 1973), cert. denied 414 U.S. 1112, 38 L.Ed.2d. 739, reh. denied 415 U.S. 939, it was also alleged that certain defendants had engaged in a conspiracy to "freeze out" Class B stockholders in various ways (improperly limiting dividends etc.) and that such acts were also in violation of the Securities Exchange Act and rules thereunder. Plaintiffs sought various types of relief from the Court, including an order compelling payment of higher past and future dividends.

After extensive discovery was undertaken by the parties in the succeeding months and years, during which time efforts at settlement were also pursued, a settlement was finally reached and presented to the court,[1] on the basis of a restructured capitalization which would, if consummated, eliminate the controversy between Class A and Class B shareholders. In March 1973, the district court approved the settlement (59 F.R.D. at 373) and its decision was upheld on appeal, (486 F.2d 1398) and certiorari was denied.

Under the proposed settlement, which the court approved, a majority of the minority Class B stockholders could reject the plan (59 F.R.D. at 374). Pursuant to the proposed settlement, and promptly following the court's decision, MoPac, in April 1973, filed its application with the Commission under Section 20a of the Interstate Commerce Act, 49 U.S.C. §20a, for authority to issue the various stocks called for in the recapitalization plan. After notice of the application was given to all MoPac stockholders, hearings were held, at which plaintiffs herein and others expressed their opposition to MoPac's application.

At a special meeting of MoPac stockholders, held on June 15, 1973, 86.5% of the outstanding shares of Class A stock were voted in favor of the recapitalization plan and 83.4% of the outstanding shares of Class B stock were voted in favor of the recapitalization plan. Among the minority shares in both classes (i.e. those shares not owned by either Mississippi or Alleghany), 95.5% of Class A shares present and voting were voted in favor of the plan and 84.7% of the Class B shares present and voting were voted in favor of the recapitalization plan.

(Footnotes at end of Opinion)

On December 14, 1973 Division 3, consisting of three Commissioners, issued its report and order granting MoPac's application. The order was made effective immediately, as time was of the essence in view of the deadline set forth in the settlement agreement. On December 28, 1973 the Commission issued an order denying petitions of plaintiffs and others to stay the effective date of the December 14, 1973 order. On January 23, 1974 the Commission issued its order denying petitions for reconsideration of the December 14 order and on March 4, 1974, the Commission issued an order denying petitions seeking a finding that an issue of general transportation importance was involved. On January 21, 1974 the MoPac plan of recapitalization was consummated. The instant actions were commenced on April 4, 1974 while the companion case in the Eastern District of Missouri, Labelle Gillespie v. United States, et al., Civil Action No. 74-239 C(2) was commenced on April 2, 1974. The Three-Judge Court which was convened in Labelle Gillespie v. United States, et al., supra, stated in their opinion:

> "The amendment to MoPac's Articles of Association was made in conformity to Missouri law. MoPac's Articles of Association expressly provide that the rights of all holders of capital stock of the company are subject to change, alteration, abrogation, or repeal in any matter permitted by the laws of Missouri. And Section 388.220, R.S. Mo., specifically authorizes modifications of the stock structure of railroad companies such as were here made. Hence, since far more than the requisite number of shareholders of each class of stock has voted in favor of the changes, the question before the Interstate Commerce Commission on the Section 20a application was a very narrow one of whether the issuance of the new securities to effectuate the plan and amendment to the Articles of Association would be 'for some lawful object within [MoPac's] corporate purposes and compatible with the public interest', and would be 'reasonably necessary and appropriate for such purpose'."

This court's function is limited. The decisions of independent regulatory agencies are generally sustained if within the authority of the agency's statutory power and are based upon appropriate findings which are in turn supported by substantial evidence. Consolo v. Federal Maritime Comm'n., 383 U.S. 607, 619-621 (1966); United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535 (1945). This standard applies in cases involving Commission decisions under §20a of the Act. Chicago S.S. and S.B.R.R. v. United States, 221 F.Supp. 106, 109 (N.D.Ind. 1963). "The test of judicial review for an order of the Commission is whether the action of the Commission is supported by 'substantial evidence' on the record reviewed as a whole." Metropolitan Shipping Agents of Illinois, Inc. v. Interstate Commerce Commission, 342 F.Supp. 1266, 1268 (D.N.J. 1972).

The Commission's review in the MoPac recapitalization was limited under Section 20a(2) of the Act to a determination of whether the issuance of securities in connection with the plan would be "***for some lawful object within [the carrier's] corporate purposes, and compatible with the public interest ..." and "... is reasonably necessary and appropriate for such purpose".

The Commission, in an exhaustive report, found that the recapitalization was the result of extensive arms-length bargaining by MoPac, Mississippi and Alleghany and was analysed by independent financial and investment advisers specializing in corporation and transportation finance. The I.C.C. further noted that the settlement was approved by the court in the Levin case, after due consideration being given to the rights and possible remedies of each class of stockholders. The plan of recapitalization had been approved by a majority of each class of stockholders and by a majority of the minority stockholders of each class. The Commission further found that the allocation of new shares (1 new preferred share for 1 share of old Class A stock, and 16 shares of new common for 1 share of old Class B plus a cash sum) is reasonable and fair in view of the present and prospective worth of MoPac. The I.C.C. summarized in their report (p. 59) as follows:

> "In our opinion, the proposed plan is not contrary to the public interest. In fact, considering the benefits to each class of stock and the advantages to the carrier, it is our conclusion that the plan of recapitalization will be in the best interest of the stockholders and the carrier and will be compatible with the public interest."

The benefits of the recapitalization plan to MoPac include the elimination of the old class voting system and the dividend conflict which caused considerable dissension in the past and the fact that the Mississippi River Corporation would own a majority of both preferred and common stocks, thereby eliminating the old Class B veto power. As a result, MoPac will have greater management flexibility and stability and MoPac will be in a better position to consider and be considered for mergers and consolidations in the future.

As to the main contention of the plaintiffs asserting that they were unlawfully deprived of the value of their old Class B stock on the theory that the "book value" of the Class B stock was almost $9,000 a share, the I.C.C. pointed out that book value cannot be the measure of fair value of stock; rather, earnings must be considered and the capitalized earnings method is the proper means of analysis. See, Schwabacher v. United States, 334 U.S. 182 (1948); Boston & M.R. Securities

Modification, 275 I.C.C. 397, 431-33 (1950); Levin v. Mississippi River Corp., supra, at 369.

As to the other contentions of the plaintiff, they do not merit extensive comment since the Commission's findings on these issues were also warranted.[2]

We do not find any reason to differ with those findings. Our sole function is to determine whether the decision of the Commission is consistent with the public interest and lawful. We agree that it is and affirm those findings and decision.

Therefore, the order of the Commission questioned herein should be and is hereby affirmed.

Submit an Order.

Dated: April 20, 1976

APPENDIX D

Memorandum of the U.S. District Court, District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

JAMES C. GABRIEL, Pro se, JOHN CHARLES VAIANI, Pro se, WILLIAM R. WESSON, Pro se,	:	CONSOLIDATED CIVIL ACTIONS
Plaintiffs	:	74-469 74-470 74-471
vs.	:	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION	:	MEMORANDUM
Defendants	:	
- and -	:	
MISSOURI PACIFIC RAILROAD CO.,	:	
Defendant-Intervenor	:	

This Court, having fully decided this matter by opinion and subsequently entered an order dated May 6, 1976 affirming the decision of the Interstate Commerce Commission, is now presented with a motion by each plaintiff for reargument.

The motions are denied. The United States will submit an order.

JAMES HUNTER III, U.S.C.J.

LAWRENCE A. WHIPPLE, U.S.D.J.

CLARKSON S. FISHER, U.S.D.J.

Dated: May 19, 1976.

ORIGINAL FILED
JUN 2 1976
ANGELO W. LOCASCIO, CLERK

APPENDIX E

Letter Opinion of Clarkson S. Fisher, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON, N. J. 08605

CHAMBERS OF
CLARKSON S. FISHER
JUDGE

June 9, 1976

Mr. James C. Gabriel,
P.O. Box 94,
Sea Girt, N.J. 08750

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1550 Ocean Avenue,
Mantoloking, N.J. 08737

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John H. D. Wigger, Esq.,
Department of Justice,
Washington D.C. 20530

Hanford O'Hara, Esq.,
Interstate Commerce Commission,
Washington, D.C. 20423

LETTER OPINION

Re: Gabriel et al. v. U.S.A. et al. 74-469

Gentlemen:

The Court is in receipt of yet another motion for reconsideration of the Court's judgment. After consultation with the other two members of the Court, I am authorized to advise all parties that the motion is denied.

The government will submit an order.

Very truly yours,

Clarkson S. Fisher,
U.S.D.J.

CSF/efr
c.c. Hon. James Hunter III
Hon. Lawrence A. Whipple

APPENDIX G

Order of the U.S. District Court, Dated June 21, 1976

RLR:kew
74 1380
74 1383
74 1384

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMES C. GABRIEL, Pro Se, JOHN CHARLES VAIANI, Pro Se, WILLIAM R. WESSON, Pro Se, Plaintiff	:	CONSOLIDATED CIVIL ACTIONS 74-471 74-470 74-469
v.	:	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants	:	ORDER
-and-	:	(Judge Hunter) (Judge Whipple) (Judge Fisher)
MISSOURI PACIFIC RAILROAD COMPANY Defendant-Intervenor	:	

This matter, having been opened to the Court by James C. Gabriel, John Charles Vaiani and William R. Wesson, plaintiffs pro se, in the presence of Jonathan L. Goldstein, United States Attorney for the District of New Jersey, Ronald L. Raisner, Assistant United States Attorney appearing, Thomas E. Kauper, Assistant Attorney General of the United States, John H. D. Wigger, Esquire, appearing, Fritz R. Kahn, General Counsel for the Interstate Commerce Commission, Hanford O'Hara, Esquire appearing, Milton Rosenkranz, Esquire and Leon Leighton, Esquire appearing, and the Court having considered all of the documents filed and the Court having filed a letter opinion dated June 9, 1976 and for good cause shown;

It is on this ~~15th~~ 21st day of June, 1976

ORDERED that each plaintiff's motion for reargument herein be and the same hereby is DENIED without costs.

FILED
JUN 21 1976
At 2:45 P. M
ANGELO W. LOCASCIO
Clerk

JAMES HUNTER, III
UNITED STATES CIRCUIT JUDGE

LAWRENCE A. WHIPPLE
CHIEF, UNITED STATES DISTRICT JUDGE

CLARKSON S. FISHER
UNITED STATES DISTRICT JUDGE

APPENDIX H

Order of the U.S. District Court, Dated June 29, 1976

RLR:kew
74 1380
74 1383
74 1384

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMES C. GABRIEL, Pro Se, JOHN CHARLES VAIANI, Pro Se, WILLIAM R. WESSON, Pro Se,	:	CONSOLIDATED CIVIL ACTIONS
Plaintiffs	:	74-471
v.	:	74-470 74-469
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,	:	ORDER
Defendants	:	
-and-	:	(Judge Hunter) (Judge Whipple) (Judge Fisher)
MISSOURI PACIFIC RAILROAD COMPANY	:	
Defendant-Intervenor	:	

This matter, having been opened to the Court by James C. Gabriel, John Charles Vaiani and William R. Wesson, plaintiffs pro se, in the presence of Jonathan L. Goldstein, United States Attorney for the District of New Jersey, Ronald L. Reisner, Assistant United States Attorney appearing, Thomas E. Kauper, Assistant Attorney General of the United States, John H. D. Wigger, Esquire, appearing, Fritz R. Kahn, General Counsel for the Interstate Commerce Commission, Hanford O'Hara, Esquire appearing, Milton Rosenkranz, Esquire and Leon Leighton, Esquire appearing, and the Court having considered all of the documents filed and the Court having filed a memorandum dated May 29, 1976 and for good cause shown;

It is on this 29th day of June, 1976

ORDERED that each plaintiff's motion for reargument herein be and the same hereby is DENIED without costs.

JAMES HUNTER, III
UNITED STATES CIRCUIT JUDGE

LAWRENCE A. WHIPPLE
CHIEF, UNITED STATES DISTRICT JUDGE

CLARKSON S. FISHER
UNITED STATES DISTRICT JUDGE

FILED
JUN 29 1976
At 11:00 A M
ANGELO W. LOCASCIO
Clerk

APPENDIX I

MO-PAC Charter

FD 8958

FINANCE DOCKET No. 9918

MISSOURI PACIFIC RAILROAD COMPANY REORGANIZATION

Submitted July 6, 1954. Decided July 29, 1954

Upon supplemental record made at reopened hearings held pursuant to the provisions of paragraph (b) of section 208, title 11, U. S. Code, and section 77, of the Bankruptcy Act, as amended, plan of reorganization for the Missouri Pacific Railroad Company, and others, debtors, modified and approved.[1]

Appearances as in prior reports and, in addition, *Arthur Arsham, Harold Brown, Walter H. Brown, Jr., Carl B. Callaway, Allan F. Conwill, Joseph A. Doyle, Felix A. Fishman, Edward L. Friedman, Jr., Emanuel Gruss, Edward J. Hickey, Jr., John P. Humes, Percival E. Jackson, Jerome M. Kirshbaum, Ferdinand H. Kolvoord, Alan S. Kuller, Frederick M. Myers, Jr., Eldon S. Olson, William P. Palmer, David M. Potts, Thomas J. Sheehan, Jr., John Ben Shepperd, Alfonso E. Solanas, Henry I. Stimson, Alfred B. Teton, Jay W. Tracey, Jr.,* and *Lyonel E. Zuna.*

SEVENTH SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the report proposed by members of the staff of our Bureau of Finance. Thereafter, the bankruptcy trustee, acting pursuant to authorization and direction of the United States district court of jurisdiction in these proceedings, filed with us a petition accompanied by a stipulation and agreement, executed by a majority of the parties in interest, embracing certain modifications of the proposed-report recommendations, which, if adopted, would be acceptable to the parties signatory to the stipulation and agreement as an agreed system plan. Our conclusions differ somewhat from those contained in the proposed report.

Request for oral argument on exceptions was made by the independent directors of the Missouri Pacific Railroad Company, debtor. Similar requests made by the Alleghany Corporation, owner of approximately 49 percent of Missouri Pacific common stock, and Oscar Gruss & Son, holders of International-Great Northern Railroad Company adjustment-mortgage bonds, were later withdrawn, with the res-

[1] For previous reports see 239 I. C. C. 7; 240 I. C. C. 15; 257 I. C. C. 479 and 745; 275 I. C. C. 59 and 203; and 282 I. C. C. 629.

date, on 30 days' notice, at their principal amount plus all interest then due and payable thereon.

(*b*) *New equity issues.*—In lieu of the issue of a $100 par-value preferred stock and 1 class (A) of no-par-value common stock (exclusive of possible issue of a class B stock upon exercise of warrants issuable to old common-stock holders) recommended in the proposed report, the stock of the reorganized company would consist of 2 classes of common stock, designated A and B, both of which would be without par value and would have full voting rights. Each share of class A stock would have a stated value of $100, and each share of class B stock would have a stated value of either $100 or $50, to be determined by the Commission.

(*c*) *Class A common stock.*—Dividends on this class of new common stock would be limited to either $5 or $4 per share in a calendar year, as the Commission shall determine, irrespective of what amounts may have been paid on class B common stock. Dividends on class A stock would be noncumulative, and none would be paid in the form of stock or notes or in any form other than cash or its equivalent. Class A stock would be nonconvertible, and in the event of dissolution, winding up, or liquidation of the company, the holders of this class of stock would be entitled to receive out of the assets of the company $100 per share before a distribution is made to holders of class B stock, who thereafter would be entitled to any further distributions out of the assets of the company, without further participation by holders of class A stock.

The total stated value of class A common stock, $201,824,761, recommended in the proposed report, would be reduced to $191,755,818 in order to (*a*) eliminate the amount of $3,561,839 which was thereunder allocated to the Missouri Pacific secured serial bonds and $293,639 allocated to the New Orleans publicly held stock and (*b*) take account of the reduction of $6,213,465 in the allotment to International adjustment mortgage bonds as set forth in paragraph (*g*) hereof.

(*d*) *Class B common stock.*—This class of new common stock, having a total stated value of $4,065,717, would be issued only to holders of Missouri Pacific common stock on a basis of 1 share of new, of a stated value of $100 per share, for each 20 shares of old stock, or, in the alternative, in the discretion of the Commission, 1 share of new, of a stated value of $50 per share, for each 10 shares of old stock.

No dividends could be declared on class B common stock in any calendar year unless, during that year, dividends of $5 or $4 (whichever is prescribed by the Commission) have been paid or set apart for payment on the class A common stock; but there would be no other restriction on amount of dividends which may be declared and paid on the class B stock.

1, 1956, to the extent earned in the preceding calendar year. Interest shall be mandatorily payable to the extent that available net income is sufficient for the payment thereof; and all interest not paid because of this limitation shall be noncumulative. Interest on the debentures to the extent so earned in each calendar year shall become owing as a debt on December 31, in such year, even though not payable until April 1, in the next succeeding year. If, in any year, interest on the debentures is not covered by available net income, such interest may, in the discretion of the board of directors of the reorganized company, be paid out of any funds lawfully available therefor.

The debentures shall be redeemable as a whole or in part on any interest payment date, on 30 days' notice, at their principal amount plus (*a*) all unpaid interest earned thereon to the end of the calendar year preceding the date of redemption and (*b*) interest at the rate of 5 percent per annum from the end of such calendar year to the redemption date, whether or not such interest is earned. Upon maturity, whether by acceleration or otherwise, the debentures shall be entitled to (*a*) all unpaid interest earned thereon to the end of the calendar year preceding the date of maturity plus (*b*) interest at the rate of 5 percent per annum from the end of such calendar year to the date of maturity, whether or not such interest is earned. All interest on the debentures after maturity shall be a fixed obligation.

Q. *New common stock, class A and class B.*—The common stock of the new company shall be divided into two classes, one of which shall be designated as class A and the other of which shall be designated as class B, each of which shall be without par value but shall have a stated value of $100 per share. The number of shares in each class to be authorized in the certificate of incorporation of the new company shall be fixed by the reorganization managers in relation to the requirements of the plan, and the number of shares in each class to be originally issued shall be in the amounts necessary to carry out the plan. The certificate of incorporation shall permit the authorization from time to time of additional shares of common stock of either class, but shall specifically provide that the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any other class or of participating or convertible preferred stock, without the consent of the holders of not less than a majority of the number of shares of common stock of each class at the time outstanding.

Dividends on the class A common stock shall be limited to $5 a share in any calendar year, irrespective of the amounts which may have been paid on the class B common stock. Dividends on the class A stock shall be noncumulative and none shall be paid in the form of stock or notes or in any form other than cash or its equivalent. In any calendar year, no dividends on class B stock shall be declared or paid unless, during that year, dividends of $5 per share shall have been paid or declared and set apart for payment on the class A stock, but there shall be no other restriction on the amount of dividends which may be declared and paid on the class B stock.

Class A common stock shall be nonconvertible, and, in the event of dissolution, winding up, or liquidation of the new company, the holders of this class of stock shall be entitled to receive out of the assets of the new company $100 per share before any distribution is made to the holders of class B common stock, who thereafter shall be entitled to receive any further distributions out of the assets of the new company, without further participation by holders of class A stock.

Each class of common stock shall have full voting rights, and each share of stock shall entitle the holder thereof to one vote. Stockholders shall have the right of cumulative voting in the election of directors.

APPENDIX J

Alleghany Corporation Control and Purchase—Jones Motor Co.

No. MC-F-10444[1]

ALLEGHANY CORPORATION–CONTROL AND PURCHASE–JONES MOTOR CO., INC.–AND CONTROL ERIE TRUCKING COMPANY

Decided January 27, 1970

1. In No. MC-F-10444, acquisition by Alleghany Corporation of control of Jones Motor Company, Inc., and its motor carrier subsidiary, Erie Trucking Company, through purchase of capital stock of Jones Motor Company, Inc.: and merger of a wholly owned subsidiary of Alleghany Corporation into Jones Motor Company, Inc.: and subsequently the merger of Jones Motor Company, Inc., into Alleghany Corporation for ownership, management, and operation; and acquisition by Fred M. Kirby and Allan P. Kirby, Jr., individually and as coguardians of the property of Allan P. Kirby, an incompetent, of control of the operating rights and property through the transaction, approved and authorized, subject to conditions.
2. In Finance Docket No. 25686, Jones Motor Company, Inc., authorized to issue not exceeding 100 shares of its common stock, par value $1.
3. In Finance Docket No. 18656, previous orders of Commission vacated.
4. In No. MC-FC-70907, application dismissed.

David G. Macdonald and *M. Lauck Walton* for applicants.
Bernard A. Gould and *Warren I. Cohn* for Bureau of Enforcement.

REPORT OF THE COMMISSION

HARDIN, *Commissioner:*

Alleghany Corporation, a holding company with total assets in excess of $200 million, is at present subject to dual regulation under the Investment Company Act and the Interstate Commerce Act (act). It seeks, by a series of transactions hereinafter discussed, to become a motor common carrier subject to the plenary jurisdiction of the Interstate Commerce Commission under part

[1] This report also embraces Finance Docket No. 25686, Jones Motor Co., Inc., Stock; Finance Docket No. 18656, Louisville & Jeffersonville Bridge and Railroad Company, Merger, Etc.; and No. MC-FC-70907, Alleghany Corporation, Transferee, Jones Motor Company, Inc., Transferor.

newly issued common stock of Jones, and Jones will have no other capital stock outstanding.

One of the primary reasons presented by Alleghany for acquisition of the operating rights of Jones is to lessen its tax burden. Such burden arises from the fact that Allan P. Kirby, as of February 28, 1969, was the beneficial owner of 4,084,813 shares, or 56.21 percent of the outstanding common stock of Alleghany. Alleghany is, therefore, for Federal income tax purposes, considered a personal holding company since one person (less than 5 individuals) owns more than 50 percent of its stock and has "personal holding income," (60 percent or more of adjusted gross income consists of dividends and interest) and is therefore subject to a 70-percent penalty tax on the "undistributed personal holding income." Alleghany does not want to distribute all such income to avoid the tax. With Alleghany the recipient of the operating revenue generated by its Jones Motor Division, it alleges it would be an operating company rather than a holding company for Federal tax purposes. It could then retain and reinvest net earnings and would not be subject to the 70-percent penalty tax.

Evidence of past operations by Jones under its operating rights is reflected in an abstract of shipments showing all shipments transported in January 1969. The traffic handled consisted of a wide variety of commodities, showing service to points throughout Jones' authority.

In its verified statement filed on October 1, 1969, Alleghany stated that as of February 1, 1968, the date of the Penn Central merger authorized by the Commission in *Pennsylvania R. Co.–Merger–New York Central R. Co.*, 327 I.C.C. 475, Alleghany received and still holds 196,195 shares or 0.81 percent of the 24,104,708 shares outstanding of Penn Central stock. In addition, Allan P. Kirby, controlling stockholder of Alleghany, received and presently holds 390,130 shares or 1.62 percent of the outstanding Penn Central shares. Combining their interests, Alleghany and Kirby together own 2.43 percent of the outstanding Penn Central stock. Alleghany's shares in Penn Central are held in its own name but the Kirby shares are among those held in the name of Sigler and Company.

Alleghany is also the controlling shareholder of Investors Diversified Services, which serves as an investment advisor and distributor for a group of mutual funds. As of September 30, 1969, these mutual funds held 391,900 shares or 1.63 percent of the outstanding shares of Penn Central. It is alleged investment

Alleghany Corporation Control and Purchase—
Jones Motor Co.

during the period of the trust. Prior to consummation of the transaction proposed herein, Alleghany shall submit for approval of the Commission a plan showing how it intends to effectuate such trusteeship. While undoubtedly the divestiture of Penn Central shares by the trustee may have certain tax consequences, i.e., either the sale will result in a profit or a loss, Alleghany may avoid the tax consequence by electing not to consummate the proposed transaction. Further, the record before us indicates that the trustee should experience little difficulty in disposing of 390,130 shares of Penn Central now owned by Alleghany. Contained in the affidavit of Fred M. Kirby, previously referred to, is the folowing statement:

15. As of April 9, 1969, the date of the aforesaid Application under §5, the total amount of the capital stock of Penn Central owned by the funds sponsored by IDS /Investors Diversified Services, Inc./ was 1,020,000 shares or approximately 4.23% of the total amount outstanding, all of which were held for investment purposes only and not for purposes of control. As of this date /September 30, 1969/, all but 391,900 of said shares, representing approximately 1.63% of the Penn Central capital stock outstanding, have been sold.

We will further require as a condition to approval that all interlocking directorates between Alleghany and Penn Central, its subsidiaries, and affiliates be terminated. Prior to consummation, proof of such termination shall also be submitted to the Commission. *Chesapeake & O. Ry. Co. Purchase,* 261 I.C.C. 239. Still further, in accordance with Alleghany's suggestion, and our own independent evaluation of the situation, we shall require as a condition for consummation of the proposal that the trusteeship of Alleghany's MoPac securities, as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission. The Commission in the future may either in response to a petition or on its own motion institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of MoPac securities should be required.

The Penn Central shares not owned by Alleghany, but controlled by Fred M. Kirby and Allan P. Kirby, Jr., as coguardians of the property of their father, Allan P. Kirby, present a special problem. The 390,130 shares of Penn Central owned by Allan P. Kirby represent 1.62 percent of the outstanding Penn Central shares. While Fred M. Kirby and Allan P. Kirby, Jr., are by the terms of the conditions imposed relating to interlocking

APPENDIX K

ICC's Refusal to Grant Permission for *Amicus Curiae* Brief

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 8th day of July, 1966.

JOHN W. BUSH,
WILLIAM H. TUCKER,
HOWARD G. FREAS,
KENNETH H. TUGGLE,
RUPERT L. MURPHY,
LAURENCE K. WALRATH,
ABE McGREGOR GOFF,
CHARLES A. WEBB,
PAUL J. TIERNEY,
VIRGINIA MAE BROWN,
WILLARD DEASON,
) Commissioners.

-----o-----

Mississippi River Fuel Corp., et al. v. Rose Slayton, et al., No. 17,836, U.S. Ct. of Appeals, 8th Cir.
(F. D. No. 22951)

Voted not to authorize the filing by the General Counsel of of a brief amicus curiae in the above-entitled court case; Chairman Bush voting to direct the General Counsel to file the aforesaid brief in support of the petition for a writ of certiorari.

A true copy:

H. Neil Garson

SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-405

JAMES C. GABRIEL, *Pro Se,* a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for Himself,

Plaintiff-Appellant, Pro Se,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervening Defendant-Appellee.

No. 76-443

WILLIAM R. WESSON, *Pro Se,* a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se,

Joined By

JOHN CHARLES VAIANI, *Pro Se,* a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION OF MISSOURI PACIFIC RAILROAD COMPANY TO AFFIRM

LEON LEIGHTON
Attorney for Appellee
Missouri Pacific Railroad Company
6 East 45th Street
New York, New York 10017

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IN THE

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OCTOBER TERM, 1976

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Plaintiff-Appellant, Pro Se,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervening Defendant-Appellee.

No. 76-443

WILLIAM R. WESSON, *Pro Se*, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se,

Joined By

JOHN CHARLES VAIANI, *Pro Se*, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION OF MISSOURI PACIFIC RAILROAD COMPANY TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee Missouri Pacific Railroad Company (MoPac) moves that the judgment of the District Court be affirmed.

Appellants are holders of MoPac's Class B stock. The judgment appealed from (J.S., Appx. B)* affirmed an order of the Interstate Commerce Commission (Commission), pursuant to 49 U.S.C., §20a, authorizing a recapitalization plan of MoPac (1a-3a). The recapitalization provided for exchange of $850 in cash and sixteen shares of new common stock of MoPac for each share of Class B stock (J.S., A-7).

Pertinent Opinions

The Commission's report, *Missouri Pacific R. Co. Securities,* is printed in 347 I.C.C. 377 (1973). Its order denying reconsideration is printed at 6a-8a; see also 9a. The opinion of the District Court is not reported; it is printed in J.S. A-1 to A-8.

The District Court in the Eastern District of Missouri similarly affirmed the Commission's order, and dismissed the complaint of another Class B stockholder (44a-45a). Its opinion likewise is not reported; it is printed at 46a-55a.

The recapitalization authorized by the Commission resulted from the settlement of a Class B stockholders' class action. This settlement was approved by Judge Weinfeld. *Levin* v. *Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y. 1973), affd. on opinion of Judge Weinfeld below, *sub nom. Wesson* v. *Mississippi River Corporation,* 486 F. 2d 1398 (2d Cir. 1973) (see 33a-34a), *cert. den. sub nom.*

* References marked "J.S." are to the Jurisdictional Statement of appellant Wesson.

Wesson v. *Levin,* 414 U.S. 1112 (1973), rehearing denied 415 U.S. 937 (1974).

Appellants emphasize two other opinions. The first is the report of the Commission approving the 1956 reorganization plan of MoPac pursuant to Section 77 of the Bankruptcy Act. *Missouri Pac. R. Co. Reorganization,* 290 I.C.C. 477 (1954). The second held that approval of any plan of consolidation of appellee with another railroad required the assent of a majority of the holders of MoPac's Class B stock, as well as of its Class A stock. *Levin* v. *Mississippi River Corp.,* 386 U.S. 162 (1967).

Statute Involved

The pertinent portions of 49 U.S.C., §20, are set forth in Appendix 1 to this brief.

Question Presented

Have appellants sustained the burden of showing that the Commission's order is:

(a) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; or

(b) "unsupported by substantial evidence"?[1]

[1] See *Bowman Transp.* v. *Ark.-Best Freight Systems,* 419 U.S. 281, 284-285 (1974).

Statement

A. *Proceedings Prior to Southern District Court Action*

The situation resulting from MoPac's 1956 reorganization was thus summarized in the Commission's Report, 347 I.C.C., *supra,* at 379-380:

> "In 1956, MoPac was reorganized under Section 77 of the Bankruptcy Act pursuant to a plan of reorganization authorized by this Commission. *Missouri Pac. R. R. Reorganization,* 290 I.C.C. 477 (1954), approved in *In Re Missouri Pac. R. R.,* 129 F. Supp. 392 (E.D. Mo. 1955), affirmed *sub nom. Missouri Pac. R. R. 5¼% S.S.B.C.* v. *Thompson,* 225 F. 2d 761 (8th Cir. 1955), cert. denied, 350 U.S. 959 (1956). Upon reorganization, MoPac was authorized to issue two classes of stock: Class A and Class B, each share of each class being entitled to one vote. . . . 98 percent of the voting stock is held by Class A stock and 2 percent by Class B stock. Of the total shares outstanding, Mississippi River Corporation (Mississippi) owns approximately 62 percent of MoPac's Class A shares and Alleghany Corporation (Alleghany) owns approximately 53 percent of the Class B stock." (Footnote omitted)

The effect of this reorganization was thus described by Judge Weinfeld (59 F.R.D., *supra,* at 357, 358):

> "The capitalization of MoPac has been the subject of controversy and litigation for almost forty years. The Class A and Class B stockholders have been at odds over their respective rights and interests over a substantial period. * * *
>
> * * *

> "Obviously, the Class A stockholders have the power to elect MoPac's Board of Directors, as well as voting control with respect to other but not all corporate matters. On mergers, consolidations or reorganizations involving issuance of additional stock or the alteration of the rights of either class, approval by a majority of each class is required. Thus, in effect, the Class B stock has a veto power over such actions. In practical terms, the 'ingenious' solution envisaged under the 1956 reorganization created a basic conflict between the two classes, with the equity ownership principally in the B stock, but with effective operating control in the A stock.
>
> "* * * Thus the disparity of interest between the two classes of stock is further aggravated by Alleghany's majority ownership of the B stock, which gives it an independent veto power over any corporate action that requires the separate approval of the B stock."

In January 1964, MoPac filed an application with the Commission for permission to consolidate with T & P to form a new railroad (T & M). MoPac advised that it would submit the proposed plan to its stockholders on the basis of a collective, rather than a class, vote. This Court (reversing the Court of Appeals) held that the plan required "the assent of the majority of the shareholders on a separate class-vote basis." *Levin* v. *Mississippi River Corp.,* 386 U.S. 162, 170 (1967).

Appellants place great importance on some of the language in that opinion, and on comments from the Bench during the oral argument. They similarly emphasized these matters before Judge Weinfeld. He said (53 F.R.D., *supra,* at 359):

"Since a number of stockholders emphasize certain rhetorical statements in the Court's opinion,[6] it is well to bear in mind the Court's precise holding, and further its statement: 'We do not . . . reach the merits of the proposed plan. . . .'[7] The Court's ruling ended the proposed consolidation when in March 1967 MoPac and T & P abandoned their plan, but further litigation was ahead."

"6. See, *e.g.*, *id.* at 169: 'The plan proposes to exchange four shares of stock of T & M for one share of MoPac Class B, which . . . . is like exchanging four rabbits for one horse.'"

"7. *Id.*, at 170.

This Court had made clear the limited scope of its holding, saying (386 U.S., at 170):

> "We do not, of course, reach the merits of the proposed plan *which is the concern of the Commission in the first instance*. Any reference to the effect of the plan is not to be construed as in any way passing upon its merits. With reference to voting rights, we hold only that in a consolidation as proposed here, Missouri law must be applied and that §351.270 of that law requires the application of the Articles of Association of MoPac, which in turn, require the assent of the majority of the shareholders on a separate class-vote basis" (emphasis added).

This defect has been remedied in the instant recapitalization plan authorized by the Commission. Prior to submission to the Commission, it was approved by 83.4 percent of all the Class B stock, including 84.7 percent of the stock held by others than Alleghany; and by 86.5 percent of all

the Class A stock, including 95.5 percent of the stock held by others than Mississippi. 347 I.C.C., at 387-388.

B. *The Southern District Action*

In 1967 Alleghany and two individual owners of class B stock brought a class action suit against MoPac and Mississippi in the Southern District of New York, "to compel the payment of higher dividends in past and future years. Other causes of action were alleged, including charges of conspiracy by Mississippi and members of MoPac's Board of Directors to freeze out class B stockholders and allegations that certain acts of defendants were in violation of the Securities and Exchange Act, rule 10b-5 thereunder, and of defendants' common law fiduciary duty to class B stockholders" (347 I.C.C., at 380-381, fn. omitted). Judge Bryan ordered that the action be maintained as a class action on behalf of all class B stockholders (59 F.R.D., at 359; see also 56a to 59a).

As a result of pretrial discovery "as thorough as could be and all pertinent facts exposed by the litigants in preparation for a contested trial," "extended negotiations were participated in not only by the lawyers representing the parties, executive and financial officers of the corporations involved, but also by independent financial analysts and investment advisers specializing in corporate and transportation finance" (59 F.R.D., at 360). The terms of the proposed settlement are set forth in *ibid.*, at pp. 360-361, and are repeated in the opinion of the New Jersey District Court (J.S., A-7 to A-8).

The settlement was supported by Alleghany, the owner of 53% of the Class B stock, and by the other two plaintiffs, each of whom also owned a substantial number of

shares reflecting a heavy investment in the stock (59 F.R.D., at 366-367). There were eighteen objectors (including the instant appellants), who owned a total of approximately 1,167 shares,—less than 3% of the total (p. 367).

"That a comparatively small number of holders of shares reflecting a small percentage of the total outstanding oppose, as against a great majority who favor, the settlement does not relieve the Court of its function in passing upon the fairness of the proposal" (*ibid.*, note 40).

Accordingly Judge Weinfeld analyzed the proposed settlement with his usual meticulous care. He pointed out the following factors favoring approval of the settlement:

a. "There can be little doubt that to maintain its competitive strength it is imperative that MoPac link itself with another system. Yet its efforts in this direction have been thwarted because of the disparate interests of the two classes of shareholders. . . .

"* * * The elimination of the present capital structure with its built-in conflict between the two classes, which has foreclosed merger to date, will permit MoPac's officials to pursue merger prospects; it will also permit its officials to function full time in its interests and its stockholders—thousands upon thousands of hours have been devoted to litigation instead of to railroad operation" (p. 362, fn. omitted).

b. "The Board of Directors anticipates that the annual dividend rate will be $5 per share [on the new common]. With the Class B stockholders receiving sixteen shares new stock for their present one share (in addition to the $850 cash), the dividend rate will be

$80 per annum as against the current $5 per share" (p. 362; see also pp. 362-363).

c. "The Court would face the question of determining what would have constituted adequate dividends *in each year* during the period from 1964 through 1971—a decision requiring consideration of numerous variables, making the likelihood of substantial recovery questionable. * * * Plaintiffs' problems are further compounded since it is doubtful that the Court would retain jurisdiction, as plaintiffs request, in order to monitor the MoPac Board's future dividend policy which, initially, is the Board's responsibility" (p. 364; see also pp. 364-365; emphasis in original).

The Court gave thorough consideration to the objectors' claim that the shares should be evaluated at book value (pp. 367-370). He concluded: "The authorities are in agreement that book value is of little significance in appraising the value of stock; that what is of prime significance is a corporation's earning potential based on past experience," citing *Ecker* v. *Western Pac. R.R.*, 318 U.S. 448, 483 (1943) and *Consolidated Rock Prods. Co.* v. *DuBois*, 312 U.S. 510, 525-526 (1941) (p. 369).

Judge Weinfeld concluded (pp. 373-374):

"In sum, [the proposed capitalization] offers a permanent solution to the longstanding impasse between the two contending groups of stockholders—a result that cannot be achieved through successful litigation. Indeed, continued litigation may be said to be an exercise in futility since the hard core of the cause of differences between the two groups would remain and con-

tinue to plague them and MoPac. The settlement will afford MoPac the opportunity to pursue merger prospects so vital to its economic growth and existence and to permit its officials to give full time and attention to corporate affairs. Also it means the prospect of greater annual dividends to the Class B stockholders; a broader market for their shares; and the opportunity for representation on the Board of Directors."[2]

C. *The Commission Proceeding*

The Commission recognized its responsibilities under Section 20a. It said (347 I.C.C., at 408-409):

> ". . . [I]t is incumbent upon us to see that the interests of minority stockholders are protected and that the overall proposal is just and reasonable as to those stockholders. * * *
>
> * * *
>
> "* * * We believe that the results reached by the negotiators and the court under a high standard of fiduciary responsibility were clearly designed to serve the best interest of both classes of stockholders.

[2] In December 1973, the District Court denied a motion for reargument by Moumousis, another class B stockholder (20a). In April 1974, the District Court denied a motion for reargument by Napoleon Gabriel, another class B stockholder (19a). These orders were affirmed by the Second Circuit in December 1974 (35a-36a; see J.S. in No. 74-1171, p. 2), cert. den. 421 U.S. 915 (1975), rehearing denied *id.*, 1006 (1975); second petition for rehearing rejected by the Clerk (see Respondents' Memorandum in Opposition in No. 75-1169, p. 3). In March 1975, the District Court denied a motion by appellant Gabriel to set aside the judgment (37a), affd. by the Second Circuit in November 1975 (38a-39a); and denied as "vexatious" a motion to re-open in June 1975 (37a). Other motions for similar relief were denied in December 1975 (40a), January 1976 (41a), and February 1976 (42a), cert. den. 96 Sup. Ct. 1510 (1976), rehearing denied, *ibid.*, 2218 (1976).

> "Following the court's decision approving the settlement agreement, the plan was approved by an overwhelming majority of MoPac's stockholders, including a majority of the minority stock of each class. Notwithstanding this, we deem it necessary to determine whether the stockholders will receive fair value for what they will surrender and whether the plan is compatible with the public interest."

Accordingly, after due and timely notice to all MoPac stockholders (p. 378) five days of hearings were held (see J.S. 10) in which these appellants actively participated (pp. 397-402).

The Commission heard expert testimony from Alleghany's Financial Vice President; from MoPac's witness Benham, "a specialist in transportation, financial and railroad securities"; and from the Senior Railroad Analyst of First Boston Corporation, acting independently of the parties in the settlement agreement. All three testified that the offer of $2,450 for each share of Class B stock[3] was fair, on the basis of capitalization of MoPac's earnings. 347 I.C.C., at 390-394.

The most detailed testimony was given by Miss Benham (pp. 392-394, and Appendices IV through IX at pp. 425-430). The Commission said (p. 411):

> "Our conclusion is supported by the evidence of record, including the statistical data presented by witness Benham whose share capitalization method based upon available earnings and dividend payments over a 17-

[3] "Since the new common stock is valued at $100 a share, the share rate of 16 shares of new common for each share of class B stock plus $850 in cash results in a price of about $2,450 for each share of class B stock." (pp. 409-410).

year period form the basis for her conclusion that the exchange rate provided for in the settlement agreement for both classes of stock is reasonable. We believe that the detailed statistical data presented by witness Benham is entitled to considerable weight."

The contentions of these appellants, which are repeated in their jurisdictional statements herein, were fully considered by the Commission. 347 I.C.C., at 397-402. The Commission made the following findings:

a. "We have frequently held that railroad's earning power is the primary determinant of value and that future earnings that have a reasonable prospect of realization have an important bearing on value. See *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, 193; *Schwabacher* v. *United States, supra* [334 U.S. 182, 198, 201]. Current and historic earnings may properly be considered, and with varying degrees of emphasis, future earnings may be a reliable criterion of current worth. *Consolidated Rock Co.* v. *DuBois,* 312 U.S. 510, 526. . . . Although the settlement agreement was negotiated at arm's length, and the parties were presumably capable of determining their own best interest, it nevertheless appears that the settlement agreement though fair to all parties gave the benefit of doubt to the class B stockholders" (p. 411).

b. "Contrary to protestants' contention, the Commission's decision in *Missouri Pac. R. Co. Reorganization, supra* [290 I.C.C., 477)], approving MoPac's reorganization, does not constitute a bar to MoPac's present plan of recapitalization" (p. 414).

c. "In reaching this conclusion, we have given consideration to the negotiated agreement embracing the plan of recapitalization, the value per share of the classes A and B stock, the consideration to be paid for each share of existing stock, the evidence of the parties at the hearings, and their arguments and contentions on brief. In addition, we have given consideration to the fact that the elimination of the veto power held by class B stock will simplify MoPac's capital structure and that the conversion feature of the new preferred may result in an all-common stock structure. Moreover, the proposed plan will provide an effective means for the payment of higher dividends; it should render equity financing more feasible, more equitably distribute the voting power among the stockholders, eliminate the confusion between the position of classes A and B shareholders, and thus enable MoPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads" (pp. 408-409).

The Report concluded (p. 417):

"Accordingly, we find that the proposals for the issuance of securities are (a) for some lawful object within the corporate purposes of MoPac and are compatible with the public interest, which is necessary or appropriate for, or consistent with, the proper performance by MoPac of service to the public as a common carrier and will not impair its ability to perform that service; and (b) reasonably necessary and appropriate for such purpose. We further find that the proposed plan of recapitalization is fair and reasonable

to all parties in interest, that it is in the public interest, and that the proposed issuance of securities meets the statutory requirements of section 20a and conforms generally with the purposes and objectives of the national transportation policy declared by Congress."

ARGUMENT

The question presented by appellants is not substantial.

A. *Scope of Judicial Review of the Commission's Findings*

The District Court recognized that "[t]his court's function is limited. The decisions of independent regulatory agencies are generally sustained if within the authority of the agency's statutory power and are based upon appropriate findings which are in turn supported by substantial evidence," citing *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 618-621 (1966) and *U. S.* v. *Pierce Auto Lines,* 327 U.S. 515, 535-536 (1946) (J.S. A-4). As this Court said, in *Bowman Transp.* v. *Ark.-Best Freight System,* 419 U.S. 281, 285 (1974):

> "Under the 'arbitrary and capricious' standard the scope of review is a narrow one. A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.' "

This applies with special force to the Commission's finding with respect to valuation of stock in a recapitalization proposal. An exact parallel is found in the Alleghany recapitalization.

The Commission authorized Alleghany Corporation to issue 6-percent convertible preferred stock in exchange for its existing 5½-percent preferred stock. Since this authority was granted pursuant to Section 20a, the Commission made the same ultimate finding as it made here.[4] The District Court said (*Breswick & Co.* v. *United States,* 156 F. Supp. 227, 229, 230 [S.D.N.Y. 1957]):

> "Plaintiffs contend that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts.
>
> • • •
>
> "As to these contentions of the plaintiffs, we believe that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed."

Nevertheless, the Court rendered judgment for plaintiffs because it held that, as a prerequisite to Commission approval, it would have had to find that Alleghany had properly acquired control of New York Central. This was

[4] The Report of the Commission (F.D. No. 18,866, dated May 26, 1955) is not printed in full in the Commission Reports. It is printed in the Record on Appeal in 353 U.S. 151, at 105-123.

reversed and the case remanded for consideration by the District Court "of the only claim that was left open at this Court's prior disposition of this litigation, to-wit, whether 'the preferred stock issue as approved by the [Interstate Commerce] Commission was in violation of the Interstate Commerce Act.'" *Alleghany Corp.* v. *Breswick & Co.,* 355 U.S. 415, 416 (1958). The District Court then dismissed the complaint, repeating its foregoing statement. *Breswick & Co.* v. *United States,* 160 F. Supp. 754, 756 (S.D. N.Y. 1958).

In analogous situations, where the Commission has fixed the exchange ratio of securities in merger proceedings, the courts have similarly affirmed orders of the Commission, where the questions raised were within the range of the expert judgment reserved to the Commission and its findings thereon satisfied the statute. *Northern Lines Merger Cases,* 396 U.S. 491, 516-520 (1970); *Fried* v. *United States,* 212 F. Supp. 886, 889-892 (S.D.N.Y. 1963); *Stott* v. *United States,* 166 F. Supp. 851, 855-859 (S.D.N.Y. 1958); *Schwabacher* v. *United States,* 104 F. Supp. 875, 882-885 (D.D.C. 1952), on remand from 334 U.S. 182.

The *Northern Lines* case is a particularly strong authority because what the Commission was valuing there were not railroad properties, but two million acres held in fee and mineral rights in another six million acres, which "lands are rich in natural resources, including coal, oil, and timber, and are important sources of income" (396 U.S., at 517). In affirming the Commission's finding as to the exchange ratio, the Court said (p. 519):

> "The Hearing Examiner's report reviewed the extensive negotiations between the parties and the modes by which they reached a valuation of the contribution each road's shareholders were making to New Company, concluding that there had been good-faith arm's-length bargaining and that the result of this bargaining fairly reflected each group of stockholders' contribution to New Company. The Examiner found the [protestant] Committee's contention on value to be unsupported by record evidence. . . .
>
> ". . . The Commission's Second Report rejected the Committee's arguments upon basically the same grounds given by the Hearing Examiner in his 1964 Report.
>
> ". . . The District Court ruled that the Commission's finding that the terms were just and reasonable was supported by substantial evidence."

The Court concluded (p. 520):

> ". . . [A]lthough the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met. It can hardly be argued that the bargaining parties were not capable of protecting their own interests."

In *Fried, supra,* the Court said (212 F. Supp., at 892):

> ". . . [I]t is clear that the Commission properly applied the standards of the Act in its examination of the exchange ratio and that its findings are supported by substantial evidence. Basically, what plaintiffs want this Court to do is substitute its judgment for that of

the Commission as to the importance in this context of factors which plaintiffs claim should have been given greater weight, including book value and the alleged stockholder rights. This we should not and will not do."

B. *Appellants' Contentions*

Appellants are raising the same contentions which they urged without success before the Commission, before the New Jersey District Court and before the Missouri District Court. Their contention as to the proper method of valuation of their stock was similarly found without merit by Judge Weinfeld and by the Second Circuit, and this Court denied certiorari on three occasions.

1. The Claim to Book Value of the B Stock

Appellants' first basic grievance is that (a) a "due process evaluation" of their Class B stock requires that they be paid book value therefor, which is claimed to be $9,000 per share;[5] and (b) the recapitalization deprives them of their property without just compensation because it "will result in a change in equity of Class B stockholders, reducing it from 60 to 65 percent to about 25 percent."

The Commission's answer follows (347 I.C.C., at 412-413):

> "Equity or book value is of significance only in the event of MoPac's liquidation or nationalization. . . . In view of MoPac's healthy financial condition, the possibility of either liquidation or nationalization appears remote. But, even assuming that MoPac may be liquidated at some future date, the chances of stockholders recovering the book value of their stock are minimal. From past experience, we note that stockholders very rarely recover book value on liquidation.
> * * * "The short answer to that argument [that the plan "will result in a change of the equity of class B stockholders, reducing it from 60 to 65 percent to about 25 percent"] is that class B shareholders are receiving value for value based upon recognized methods of valuation and that book or equity value has little or no significance in the evaluation of stock. What is being changed is a potential value on liquidation which as indicated above, can rarely, if ever, be realized. In short, they are being deprived of a bookkeeping entry rather than a real, tangible asset. Moreover, every recapitalization contemplates a change in the equity position of stockholders, and the law recognizes that it may be accomplished with the consent of the majority of the shareholders . . ." (citations omitted).

[5] The $9,000 is the balance sheet figure. Appellants contend that the real "equity value" is about $22,500, because inflation has increased the book value.

This conclusion was approved by the New Jersey Court (J.S. A-6), and by the Missouri Court (53a-54a). It is in accordance with the decision in *Schwabacher* v. *United States,* 334 U.S. 182 (1948), where the Court, discussing a similar problem in connection with a merger proceeding, said (pp. 199, 201):

> "In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good.
>
> * * *

"A part of the capital dedicated to a railroad enterprise cannot withdraw itself without authorization any more than all of the capital can withdraw itself and abandon the railroad without approval."

Judge Weinfeld also dealt fully with this issue. He said (59 F.R.D., at 369-370):

"The authorities are in agreement that book value is of little significance in appraising the value of stock; that what is of prime significance is a corporation's earning potential based on past experience. The contention made by the objectors as to the change in equity between the two classes of stock is related to the book value concept. There appears to be no dispute that should the new preferred (1,864,052) shares be converted into new common, the equity position of the B stockholders would be reduced from 61½% to 25½%. The objectors and proponents differ as to the importance of the shift in equity. The terms equity and book value are essentially synonymous. They would have relevance if there were the prospect of MoPac's liquidation or a takeover of the railroads by the government. Neither liquidation nor the nationalization of the railroads of the country is an imminent likelihood. Judge Learned Hand's sage observation of the fallacy of measuring the value of shares by their book value is as sound today as when he stated it almost fifty years ago:

"'The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious. It presupposes, first, that book values can be realized on liquidation, which is practically never

the case; and, second, that liquidation values are a measure of present values. Everyone knows that the value of shares in a commercial or manufacturing company depends chiefly on what they will earn, on which balance sheets throw little light . . .' [52]"

"[52] *Borg* v. *International Silver Co.*, 11 F. 2d 147, 152 (2d Cir. 1925)."

2. The "Immutable" Contract in the 1956 Plan of Reorganization

The other basic grievance of appellants is "that the 1956 plan of reorganization created an 'immutable' contract with the class B stockholders which cannot be altered over the dissent of a single shareholder" (347 I.C.C., at 402). The Commission's answer follows (pp. 413-414):

"In *Missouri Pac. R. Co. Reorganization, supra* [290 I.C.C. 477], at 493[*] the Commission foresaw the possibility of MoPac's recapitalization and the alteration of rights of shareholders, and imposed a condition that such alteration should not occur without consent of at least the majority of the shares of each class of stock. MoPac has more than complied with this requirement. If the argument of protestants were to be accepted, corporate recapitalization could never be accomplished without the unanimous consent of all

[*] "The reorganized company may not alter the rights of holders of either class of stock, or authorize the issuance of additional shares of common stock of either class or of any other class, or of participating or convertible preferred stock, without the consent of at least a majority of the number of shares of common stock of each class at the time outstanding" (290 I.C.C., at 493).

" . . . [T]he vote of approval here exceeds the mandate of the Commission [*supra*]. It is our view that the stockholders' vote of approval of the plan complies with the applicable federal law and MoPac's Articles of Association" (347 I.C.C., at 388).

stockholders. So long as provision is made in the recapitalization plan for giving stockholders the approximate equivalent of what they are surrendering, as the plan does in the instant proceeding, the claim of an unlawful taking of property has no merit. * * * . . . [T]here is nothing in the Interstate Commerce Act or elsewhere in the law, or in the Commission's reorganization reports, which would convert the reorganization plan into 'the law of the land' or into an 'immutable contract' for all time."

The Missouri Court similarly concluded that "[t]he amendment to MoPac's Articles of Association was made in conformity to Missouri law . . . And Section 388.220, R.S. Mo. specifically authorizes modifications of the stock structure of railroad companies such as were here made" (51a-52a). The New Jersey Court accepted this interpretation of Missouri law (J.S. A-3 to A-4).

3. Appellants' Other Contentions

Appellants' other contentions were considered and found without merit by the Commission.

a. The Commission, as well as Judge Weinfeld, found "no merit in the assertion that Alleghany, in entering into the settlement agreement, somehow sold out to the Class B stockholders" (see 347 I.C.C., at 415-416; 59 F.R.D. at 371). This finding was approved by the Missouri and the New Jersey courts (54a; J.S. A-8). The Commission also found that, in the light of its report in *Alleghany Corporation—Control and Purchase*, 109 M.C.C. 333 (1970),—a case emphasized by appellants—the "elimination of Alleghany's ownership in MoPac's stock is a matter that tends to promote the public interest" (347 I.C.C. at 412).

b. Appellant Wesson contends (J.S. F-11 to F-12):

"The MoPac stockholders vote on June 15, 1973 in this recapitalization plan was improperly taken . . . Of the 39,731 Class B shares outstanding, Alleghany owned 21,234 shares, or a majority of the shares voted. These shares were held in trust by the Franklin National Bank, and were under continuing jurisdiction of the Interstate Commerce Commission, and should not have been voted."

These shares were voted, not by Alleghany, but by SAF Co., nominee for the Trustee, Franklin National Bank (63a). The Commission, the Missouri Court,[7] and the New Jersey Court were all satisfied that a majority of all the Class B shares had been properly voted in favor of the plan (347 I.C.C., at 387-388, 409; 51a; J.S. A-3).

c. The Commission made the following finding (347 I.C.C. at 416):

"Protestants have made numerous allegations of fraud, conspiracy and other acts of misconduct on the part of MoPac, Mississippi, and their respective officers and directors, and some have ascribed impropriety to the court which approved the settlement agreement. However, there is not one shred of evidence in the record to support any of these charges, and therefore no further investigation of any of protestants' charges is warranted on the basis of this record. We disagree with protestants' allegation that MoPac's proxy statement is misleading, or that as described by one protestant, 'a masterpiece of deception.' [sic] We have ex-

[7] MoPac is a Missouri corporation (47a).

amined the proxy statement in detail and found that it contains a full and fair disclosure of all relevant facts necessary for a reasonably prudent person to make an independent judgment. Also, the proxy form itself is clear, unambiguous and self-explanatory.[8] We find no merit in any of the protestants' allegations relating to misconduct on the part of Mo-Pac, Mississippi, or their management" (347 I.C.C., at 416).

This finding was approved by the Missouri Court (54a), and by the New Jersey Court (J.A. A-8).

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed without further briefing or oral argument.

Respectfully submitted,

Leon Leighton
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Missouri Pacific Railroad Company
6 East 45th Street
New York, New York 10017

November 1976

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[8] "Witness Wesson complained that the proxy statement sent to stockholders prior to voting on the plan was misleading, and indicated that he had made a similar complaint in writing to the Securities and Exchange Commission, his particular complaint being that the proxy statement did not fully reveal the fact that the equity of Class B stockholders would be reduced. On cross-examination, however, Mr. Wesson conceded that the Securities and Exchange Commission responded to his letter in writing and advised him that the proxy statement included all material information necessary for the exercise of prudent judgment" (347 I.C.C., at 401).

Appendix 1

49 U.S.C.

§20a. *Securities of carriers; issuance, etc.*

* * * * *

Issuance of securities; assumption of obligations; authorization

(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

* * * * *

Scope of commission's authority

(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

* * * * *

Jurisdiction of commission as exclusive and plenary

(7) The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

APPENDIX

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APPENDIX

Commission Order Approving Recapitalization

SERVICE DATE
December 14, 1973

ORDER

At a session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 6th day of December, 1973.

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO., SECURITIES

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held and briefs filed, and the Division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is referred to and made a part hereof:

It appearing, That because of limitations upon the time available for decision, the Commission, Division 3, on September 7, 1973, ordered the omission of an Administrative Law Judge's initial decision and certification of the record to the Commission, Division 3, for decision;

It is ordered, That the Missouri Pacific Railroad Company be, and it is hereby authorized (1) to issue not exceeding 1,865,702 shares of no-par $5 cumulative preferred stock, each share having one vote and initially a stated value of $100 per share, and being convertible one year after the Commission's final order of approval into common stock, share for share and being callable at $100 per share on and after January 1, 1976; (2) to issue not exceeding 635,696 shares of no-par common stock, each hav-

ing one vote per share and a stated value of $6.25 per share, and (3) to reserve and subsequently issue an additional 1,865,702 shares of said common stock upon conversion of the preferred stock, upon the terms and for the purposes stated in the said report;

It is further ordered, That the application filed by the Missouri Pacific Railroad Company on April 4, 1973, as supplemented, be, and it is hereby, granted;

It is further ordered, That except as herein authorized the aforesaid stock shall not be sold, pledged, or repledged or otherwise disposed of by the Missouri Pacific Railroad Company unless or until so ordered or approved by this Commission;

It is further ordered, That the Missouri Pacific Railroad Company shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 1115.6);

It is further ordered, that nothing herein shall be construed to imply any guarantee or obligation as to said stock, or dividends or interest thereon, on the part of the United States;

It is further ordered, That the petition of Archibald Aron to reopen the proceeding, be, and it is hereby, denied;

It is further ordered, That the order of August 13, 1973, to the extent that it conflicts with the findings and conclusions reached in the said report be, and it is hereby, modified;

It is further ordered, That this order shall be effective on the date it is served, and that unless the authority granted herein is exercised within 180 days from the date hereof, it shall be of no further force and effect.

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

(SEAL)

Commission Order Denying Stay

Service Date
December 28, 1973

ORDER

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 27th day of December, 1973.

Finance Docket No. 27346

Missouri Pacific Railroad Co., Securities

Upon consideration of the record in the above-entitled proceeding, including the report and order of the Commission, Division 3, dated December 6, 1973, and served December 14, 1973, and the petitions of James C. Gabriel, Labelle Gillespie, and John C. Vaiani, to stay the effective date of the order of the Commission, Division 3, served December 14, 1973, and the replies thereto;

It appearing, That the said order was made effective immediately, as time was of the essence;

It further appearing, That the petitions do not set forth persuasive reasons for granting the relief requested:

It is ordered, That the petitions be and they are hereby, denied.

By the Commission, Division 3.

Joseph M. Harrington
Acting Secretary.

(Seal)

Note: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

This order only denies the petitioners request for a stay of the effective date of the order served December 14, 1973. Petitions for reconsideration may be filed on or before January 14, 1974.

Commission Order Denying Reconsideration

SERVICE DATE
JANUARY 24 '74

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 23rd day of January, 1974.

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO. SECURITIES

Upon consideration of the record in the above-entitled proceeding, including (1) the report and order of the Commission, Division 3, dated December 6, 1973, and served December 14, 1973, (2) the order of the Commission, Division 3, acting as an Appellate Division, dated December 27, 1973, denying petitions for extension of the effective date of said report and order, (3) telegram-communication from applicant, filed December 26, 1973, announcing extension of the consummation date from December 31, 1973, to January 31, 1974, and (4) petitions for reconsideration of said report and order filed by James C. Gabriel, Labelle Gillespie, Rollin W. Gillespie, William R. Wesson, and John Charles Vaiani, with, in addition, the petition of James C. Gabriel including a request for reconsideration by the entire Commission and the petition of John Charles Vaiani including a request for reopening of the proceeding for further hearing.

It appearing, That petitioners in their petitions for reconsideration raise issues totally unrelated to the statutory

findings required to be made by this Commission in approving applications for authority to issue securities as provided in section 20a(2) of the Interstate Commerce Act; that some of the issues raised by petitioners deal with the legality of decisions in *Levin et al.* v. *Mississippi River Corporation, et al.*, 67 Civil 5095, dated March 19, 1973, —— Fed. Supp. —— (S.D.N.Y.) affirmed by the United States Court of Appeals for the Second Circuit in *Levin et al., and William R. Wesson* v. *Mississippi River Corporation, et al.*, on June 12, 1973, —— F. 2d —— (2d Cir. 1973), alleging that the holding of the Appellate Court was merely an indication of its high regard for the judge of the lower court rather than a full consideration of his findings; the omission of a initial report by the Administrative Law Judge is alleged to be a violation of due process, notwithstanding the provisions of the Administrative Procedures Act, 5 U.S.C. 1007; the effective date provided by the report and order of Division 3, dated December 6, 1973, is alleged to be inappropriate, without regard to the fact that all appropriate petitions by the parties filed with this Commission for extension of effective date, and, as here, petitions for reconsideration are given full consideration prior to the implementation of the proposed reorganization plan; and the reorganization plan approved by this Commission in *Missouri Pac. R. R. Reorganization*, 290 I.C.C. 477, (1954) approved in *In Re Missouri Pac. R.R.*, 129 F. Supp. 392 (E.D. Mo., 1955), affirmed sub nom. *Missouri Pac. R. R. 5¼% S.S.B.C.* v. *Thompson*, 225 F. 2d 761 (8th Cir. 1955), cert. denied, 350 U.S. 959 (1956), is alleged to contradict the authority granted here, while the proceedings are not comparable, the proposal here was a possibility considered by this Commission and provided for then;

Commission Order Denying Reconsideration

It is further appearing, That, with respect to issues that are directly related to this proceeding, petitioners reargue matters such as the proposals they consider would be an equitable plan for the proposed reorganization, matters relating to the stockholders' meeting approving the plan of reorganization as proposed by the Missouri Pacific, and matters otherwise relating to allegations of fraud, conspiracy and acts of misconduct on the part of the Missouri Pacific, Mississippi River Fuel Corp., and their officers and directors, all of which have been fully considered and discussed in the report of the Commission; and that, the petitions otherwise set forth no new material facts or arguments of any substance which were not considered by Division 3, in its said report, which would indicate that the statutory findings heretofore made are either improper or inappropriate, or which warrant (a) reconsideration of the said report and order by Division 3, (b) special reconsideration of that report and order by the entire Commission, or (c) reopening of the proceeding for further public hearing:

It is ordered, That the petitions be, and they are hereby, denied.

By the Commission, Division 3, acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Commission Order Denying Finding of General Transportation Importance

SERVICE DATE
MARCH 4 '74

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 21st day of February, 1974.

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO., SECURITIES

Upon consideration of the record in the above-entitled proceeding, including the petitions of Rollin W. Gillespie and Labelle Gillespie, William P. Wesson, John C. Vaiani and James C. Gabriel seeking a finding that an issue of general transportation importance is involved; and

It appearing, That no issue of general transportation is involved in this proceeding:

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Affidavit of Leon Leighton

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action 74-471

JAMES C. GABRIEL, *Pro Se*,

Plaintiff,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

Civil Action 74-470

JOHN CHARLES VAIANI, *Pro Se*,

Plaintiff,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

Civil Action 74-469

WILLIAM R. WESSON, *Pro Se*,

Plaintiff,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

I am the attorney for intervening defendant Missouri Pacific Railroad Company (MoPac). I am personally familiar with all of the facts stated, except those stated on information and belief, in regard to all of which the source is indicated.

This affidavit is made in opposition to the cross-motions of the respective plaintiffs for an order of this Court restraining MoPac from converting the cumulative preferred stock into the new common stock, until the above-captioned actions have been determined by the Courts (including any appeals from the decision of this Court); and directing defendants United States of America and Interstate Commerce Commission to implement such stay.

In disregard of Rule 12 of this Court, the respective notices of cross-motion were not received until November 20 (Gabriel), November 21 (Wesson), and November 25 (Vaiani). Therefore this answering affidavit could not be file in compliance with the time schedule in Rule 12, and there has not been adequate time to obtain an affidavit from the one with personal knowledge of the facts set forth in ¶9, *infra.*

1. Pursuant to the order of the Interstate Commerce Commission dated December 14, 1973 whose annulment is sought by the instant proceedings, the outstanding preferred stock of MoPac can be converted share for share for common stock, at any time after December 14, 1974. Although these actions were instituted on April 4, 1974, no

application for a stay was made until recently. If a stay be granted pending possible appeals to the Supreme Court, the exchange will be delayed for a period of several months. Plaintiffs have not shown any basis for such extraordinary relief.

2. The oft-cited case of *Virginia Petroleum Job. Ass'n* v. *Federal Power Com'n,* 259 F. 2d 921, 925 (D.C. Cir. 1958),* set forth four essential factors, all of which must be satisfied by one seeking to obtain a temporary injunction against an order of an administrative agency. The two factors which plaintiffs have failed to meet are:

"(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review."

"(3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . Relief saving one claimant from irreparable injury at the expense of similar harm caused another might not qualify as the equitable judgment that a stay represents."

A. *The unlikelihood of prevailing on the merits on the appeal.*

3. The judgment and opinion of the United States District Court in the Eastern District of Missouri (the St.

* This was a *per curiam* decision by a panel consisting of Judges Miller, Bazelon and Burger. Shephard's Citations shows the frequency with which the case has been cited. It is referred to with approval in the Court's opinion in *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 821 (1973).

Louis action) cogently answers each of the arguments urged by plaintiffs for annulling the Commission's order, and indicates how unlikely it is that they will prevail in this Court, or on appeal to the Supreme Court.

4. Unfortunately, the judgment of one three-judge court, dismissing a complaint seeking annulment of a Commission order, is not *res judicata* of such an action in a different three-judge court. See *New York Central Railroad Company* v. *United States,* 200 F. Supp. 944, 949-950 (S.D.N.Y. 1961)); *Kansas City Sou. Ry.* v. *U. S.,* 282 U.S. 760 (1931). However, it is submitted that the well-reasoned opinion of the St. Louis Court, concurred in by three Judges who are thoroughly familiar with Missouri law,* which is applicable here, should be persuasive in this Court.

5. While the decision of the St. Louis Court may not be *res judicata* of the issue, it is submitted that the judgment of Judge Weinfeld approving the recapitalization agreement, for the purpose of implementing which the Commission made the order here under review, is binding upon these plaintiffs because they are members of the class involved in that class action (see MoPac Brief, pp. 8-11). Judge Weinfeld's judgment was approved by the Court of Appeals in the Second Circuit** on the basis of his opinion, one hour after oral argument was completed.

* Chief Judge Webster had previously been a United States District Judge in the Eastern District of Missouri.

** The panel consisted of Chief Circuit Judge Kaufman, Circuit Judge Smith, and District Judge Bryan.

6. Plaintiffs refer to appeals presently pending in the United States Court of Appeals for the Second Circuit.

a. The first is an appeal from an order of Judge Weinfeld, moving to set aside his judgment on the ground that the action before him was not really a class action. Copy of his opinion dated April 8, 1974 is annexed as Exhibit A hereto. There, he reiterates that the action before him was a class action, pursuant to Rule 23(b)(1) and (2).*

b. The other is an appeal from Judge Weinfeld's order denying a motion to set aside his judgment, on the ground of newly discovered evidence, that evidence being that it was not known, at the time the settlement was approved, that the Alleghany stock was subject to a voting trust. Annexed as Exhibit B hereto is a copy of Judge Weinfeld's memorandum dated December 5, 1973, stating that such fact had been known to the Court, and had been referred to in his opinion.

7. Plaintiffs contend that the Commission's order should be annulled because it valued the Class B stock on the basis of capitalization of earnings, rather than on book value. This argument was considered and rejected by the St. Louis Court (Opinion, pp. 7-8), and by Judge Weinfeld

* The St. Louis Court recognized that this was a class action pursuant to the foregoing rule. They said (Opinion, p. 3): "The major relief sought was an order compelling the payment of higher past and future dividends . . . [A] settlement was agreed upon on the basis of a restructured capitalization which would, if consummated, eliminate the underlying cause of the constant stress between the Class A and Class B shareholders." The situation is thus identical to *Supreme Tribe of Ben Hur* v. *Cauble* (MoPac Brief, pp. 9-10).

(59 F.R.D., at p. 369). It follows the reasoning of *Schwabacher* v. *United States*, 334 U.S. 182 (1948). There, in a different but related context (the valuation of stock in a merger), the Court pointed out that the amount realizable on liquidation could not be accepted as a test of value, because "[a] part of the capital dedicated to a railroad enterprise cannot withdraw itself without authorization any more than all of the capital can withdraw itself and abandon the railroad without approval" (p. 201).

B. *Harm to other parties*

8. The chronology of the proceedings before the Commission is set forth in the opinion of the St. Louis Court (pp. 5-6). It will be noted that, though the Commission denied petitions to stay the effective date of its order on December 28, 1973, no action was taken by these plaintiffs for a judicial stay. The instant suit was not commenced until April 4, 1974, over two months after the plan of recapitalization was consummated on January 21st. The instant application for a stay was not made until seven and a half months after the institution of the suit.

9. I have been informed by C. J. Maurer, Secretary of MoPac, that the company's records indicate that 38,700 shares of its preferred stock were traded between January 21, 1974, the date of consummation of the recapitalization plan, and July 5th, when the preferred stock was split five for one; and that 95,800 shares were traded between that time and November 18th. (None of these shares was bought or sold by Mississippi River Corporation.) That means a total of 289,300 shares of preferred stock have been traded since the recapitalization became effective.

10. It is a fair assumption that many purchasers bought this stock in reliance on the fact that they could convert into common stock after December 14, 1974, since there was no stay of the Commission's order. If this conversion be delayed beyond the stipulated date, subsequent market conditions may substantially impair the value of the conversion operation. This would substantially harm the purchasers of the preferred stock. Conceivably, it might lead to actions for rescission on the ground of mutual mistake. While such actions would probably have little merit, it would still be a substantial detriment to the defendants in those actions.

11. Plaintiffs have not shown any justification for imposing such harm upon innocent third persons. They have been guilty of *laches* throughout. If they had been represented by attorneys the Court would not accept any excuse for this failure to make timely claim to any remedy sought. The plaintiffs are not entitled to any greater indulgence because they appeared *pro se*. They are not impecunious persons, for whom a court sometimes feels an impulse to extend its protective arm. Plaintiff Gabriel stated at the hearing before Judge Weinfeld on the fixation of counsel fees that he owned 370 shares of Class B stock. At the assigned value of $2,450 per share, that would make make a holding worth $906,500. The Commission's Report (p. 39) states that plaintiff Wesson owns a total of 99 shares which, at the foregoing figure, amounts to $242,550.

12. Indicative of the methods used by plaintiffs to harass and delay the Commission's proceedings, they served, simultaneously with the notice of cross-motion, motions to take the depositions of Commissioners Tuggle, Deason and MacFarland. Such depositions are not allowable, for two reasons. First, this proceeding is not *de novo* in character; the Court's function and responsibility is "exclusively that of reviewing the case upon the basis of the record actually made before the Interstate Commerce Commission at the time that the Commission made the ruling" (*Sakis* v. *United States*, 103 F. Supp. 292, 313 [D.D.C. 1952]). Secondly, "It [is] not the function of the court to probe the mental processes of the [Commission], in reaching [its] conclusions if [it] gave the hearing which the law required" (*Morgan* v. *United States*, 304 U.S. 1, 18 [1938]).

13. Of the 39,731 shares of MoPac's outstanding shares of Class B stock, 33,148 shares, or 83.4 percent, of the amount of such shares outstanding voted in favor of the recapitalization. Of the total of 14,062 shares of minority Class B stock (not owned by Alleghany), 11,905 shares, or 84.7%, voted in favor of recapitalization.

Conclusion

14. These three plaintiffs and the plaintiff in the St. Louis action had a full hearing before Judge Weinfeld and before the Commission. They have had more than their full day in court. It is submitted that the complaints should be dismissed, and the cross-motions for a stay denied. It is also respectfully submitted that, in the interests of bringing this controversy to a definitive and prompt conclusion, the Court should declare that all Class B stockholders are

Affidavit of Leon Leighton

bound by the judgment of Judge Weinfeld, affirmed by the Court of Appeals in the Second Circuit, in this class action, pursuant to Rule 23 (b)(1) and (2).

LEON LEIGHTON

(Sworn to November 26, 1974.)

EXHIBIT A ANNEXED TO AFFIDAVIT OF LEON LEIGHTON

67 Civil 5095

This motion is without merit. The holding and rationale of Zahn v. International Paper Co., 42 U.S.L.W. 4087 (U.S., Dec. 17, 1973), is applicable to class actions under Fed. R. Civ. P. 23(b)(3); as plaintiffs correctly point out, this suit was certified as a class action under Fed. R. Civ. P. 23(b)(1) and (2). Further, jurisdiction for this action was grounded on section 27 of the Securities Exchange Act of 1934, 15 U.S.C., section 78aa (1970), and pendent jurisdiction. *See* Levin v. Mississippi, 59 F.R.D. 353, 359-60 (S.D. N.Y. 1973). Section 27 does not require a minimum amount in controversy and *Zahn* is not applicable to suits brought thereunder. *See* Zahn v. International Paper Co., 42 U.S. L.W. 4087, 4091 n. 11 (U.S., Dec. 17, 1973). Finally, after the Supreme Court had denied certiorari in the instant case, the petitioner applied for a rehearing based on the *Zahn* case, and the petition was denied.

Dated: New York, N. Y.
April 8, 1974

/s/ EDWARD WEINFELD
United States District Judge

EXHIBIT B ANNEXED TO AFFIDAVIT OF LEON LEIGHTON

67 Civil 5095

That the Alleghany stock was subject to a voting trust was known to the Court. It was specifically referred to in the Court's opinion and also alluded to by counsel representing stockholders at the hearing on the settlement proposal and in briefs and affidavits submitted with respect thereto. In effect, this movant, who did not appear at the hearing, is seeking a reargument of the issues.

The motion is denied.

Dated: New York, N. Y.
December 5, 1973

/s/ Edward Weinfeld
United States District Judge

Supplemental Affidavit of Leon Leighton

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action 74-471

James C. Gabriel, *Pro Se*,

Plaintiff,

—against—

United States of America and
Interstate Commerce Commission,

Defendants.

Civil Action 74-470

John Charles Vaiani, *Pro Se*,

Plaintiff,

—against—

United States of America and
Interstate Commerce Commission,

Defendants.

Civil Action 74-469

William R. Wesson, *Pro Se*,

Plaintiff,

—against—

United States of America and
Interstate Commerce Commission,

Defendants.

State of New York,
County of New York, ss.:

Supplemental Affidavit

Leon Leighton, being duly sworn, deposes and says:

I am the attorney for intervening defendant, Missouri Pacific Railroad Company (MoPac). I am personally familiar with all of the facts stated, except those stated on information and belief, in regard to all of which the source is indicated.

This affidavit is made in order to supplement my affidavit sworn to November 26, 1974, in opposition to the cross-motions of the respective plaintiffs for an order of this Court restraining MoPac from converting the cumulative preferred stock into the new common stock, until the above-captioned actions have been determined by the Courts (including any appeals from the decision of this Court); and directing defendants United States of America and Interstate Commerce Commission to implement such stay.

A. *Harm to Other Parties*

1. My previous affidavit set forth the harm which would result to purchasers of preferred stock since the recapitalization plan became effective, if plaintiffs' motions for a temporary restraining order be granted. This affidavit sets forth additional prejudice, embodying facts which I was not able to assemble prior to the filing of the previous affidavit.

2. Mississippi River Corporation (Mississippi) owned 1,158,395 shares of the old Class A stock (59 F.R.D. 353, 358). Pursuant to the approved plan of recapitalization, these shares had been converted into the same number of new cumulative preferred stock. These shares were split five for one on July 5, 1974 so that Mississippi presently owns 5,791,975 shares of preferred.

3. Mississippi had consented to the proposed recapitalization, relying on the assurance that it would be able to convert these shares into the common stock, on a one for one basis, one year after the effective date of the Commission's order approving the recapitalization plan, which embodied that option. Plaintiffs in this action and in the St. Louis action petitioned the Commission to stay the effective date of its December 14, 1973 order. On December 28, 1973 the Commission denied the petitions; and on January 23, 1974 it denied petitions for reconsideration. The plan of recapitalization was consummated on January 21, 1974 (see St. Louis opinion, p. 6).

4. Though the St. Louis suit was instituted on April 2, 1974 and the instant suits were instituted on April 4, 1974, no application was made in any action for a judicial stay until the instant motions were made on November 20, 1974. Mississippi had every right to rely on its ability to convert its prefered stock into 5,791,975 shares of common stock at any time after December 14th. It may suffer irreparable injury if this conversion privilege be indefinitely delayed.

5. 715,657 shares of Class A stock were held by persons other than Mississippi (59 F.R.D., *supra,* at 358). 95.5% of these minority stockholders, or the holders of 683,452 shares, consented to the recapitalization plan (Commission Report, p. 19). These Class A shares were similarly exchanged for an equal number of cumulative preferred shares, which have since, as a result of the stock split, become 3,417,260 shares.

6. These stockholders, like Mississippi, had the right to rely on their ability to convert these shares into common stock after December 14, 1974. They likewise may suffer irreparable injury in the event that this privilege be indefinitely delayed.

7. The St. Louis Court said (p. 7):

> "[C]onsideration was given to the fact that elimination of the veto power held by the Class B stock would have the effect of simplifying the structure of MoPac stock and that the conversion feature of the new stock might result in an all-common stock structure. It was the opinion of the Commission that the proposed plan would provide an effective means for the payment of higher dividends, would render equity financing more feasible, would more equitably distribute the voting power among the stockholders, *would eliminate the confusion between Class A and B stockholders and would thereby enable MoPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads.*" (Emphasis added)

8. Judge Weinfeld had similarly pointed out that "[t]he elimination of the present capital structure with its built-in conflict between the two classes, which has foreclosed merger to date, will permit MoPac's officials to pursue merger prospects; it will also permit its officials to function full time in its interests and its stockholders" (59 F.R.D., *supra,* at 362).

9. The foregoing quotations indicate that plaintiffs have failed to satisfy the third essential factor to justify a temporary injunction against an order of an administrative agency. In *Virginia Petroleum Job. Ass'n* v. *Federal Power Com'n,* 259 F. 2d 921 (D.D. Cir. 1958), the Court said (p. 925):

> "(4) Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes."

B. *The Problem of Unscrambling*

10. Plaintiffs argue that if the conversion takes place, "should the Plaintiffs become vindicated and win, then great difficulty would exist in setting aside the effects of said conversion of the preferred stock and tremendous confusion and harm to all parties will come. An egg that has been scrambled cannot then be unscrambled."

11. The difficulty with this argument is that the "unscrambling" has already become impossible because of the steps taken pursuant to the recapitalization after the Commission had denied the request for a stay, and ten months prior to any application for a judicial stay.

a. MoPac has actually deposited $33,771,350 with the transfer agent. That sum represents $850 per share on the 39,731 shares of Class B stock, as required by the recapitalization. All except $1,044,650 of this amount has been actually distributed to Class B stockholders.

b. Mississippi has actually paid out $40 millions for the purchase of common stock which was tendered to it, pursuant to the terms of the recapitalization. Approximately 70% of that amount was paid to Alleghany, and the balance to a number of other Class B stockholders.

c. 3,080,160 shares of common stock have been distributed by the transfer agent to former Class B stockholders. Only 98,320 shares of such stock are still being held by it.

d. 37,900 shares of MoPac's common stock were traded on the American Stock Exchange since its listing on September 20, 1974. It would be impossible to unscramble all of these transactions.

Conclusion

For the reasons cited in the instant affidavit and in the affidavit sworn to November 26, 1974, it is respectively submitted that the complaint should be dismissed and the

cross-motions for a stay denied; and that the Court should declare that all Class B stockholders are bound by the judgment of Judge Weinfeld, affirmed by the Court of Appeals in the Second Circuit, in this class action pursuant to Rule 23(b)(1) and (2).

Leon Leighton

(Sworn to December 2, 1974.)

Extracts From Hearing Before District Court, December 4, 1974

—1—

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action #74-469

WILLIAM R. WESSON, *pro se*,

Plaintiff,

vs.

UNITED STATES OF AMERICA, *et al.*,

Defendant.

Civil Action #74-470

JOHN CHARLES VAIANI, *pro se*,

Plaintiff,

vs.

UNITED STATES OF AMERICA, *et al.*,

Defendant.

Civil Action #74-471

JAMES C. GABRIEL, *pro se*,

Plaintiff,

vs.

UNITED STATES OF AMERICA, *et al.*,

Defendant.

Thursday, December 4, 1974
Camden, New Jersey

Extracts from Hearing of December 4, 1974

Before the Honorables:

HON. JAMES HUNTER, III, Circuit Court Judge
HON. LAWRENCE A. WHIPPLE, Chief, USDJ
HON. CLARKSON S. FISHER, USDJ

Appearances:

WILLIAM R. WESSON, pro se, (Civ #74-469)

JOHN CHARLES VAIANI, pro se, (Civ. #74-470)

JAMES C. GABRIEL, pro se, (Civ. #74-471)

JONATHAN L. GOLDSTEIN, United States Attorney
For the Government

By: RICHARD W. HILL and RONALD L. REISNER, AUSA's

MILTON ROSENKRANZ, Esq.
For the Defendant, Missouri Pacific Railroad Company

By: LEON LEIGHTON, Esq., of Counsel (New York Bar)

—2—

DECISION

(Hearing recommenced at 3:00 pm in Open Court.)

Judge Hunter: I apologize for the delay. My fault. Me. I may or may not be able to read this properly since I left my glasses upstairs.

This is the Court's decision on the cross motion for injunctive relief against the conversion.

This matter was opened to the Court by the pro se plaintiffs, James C. Gabriel, John Charles Vaiani and William R. Wesson, on "cross motion" of the plaintiffs for an injunction restraining the intervening defendant, Missouri Pacific Railroad Company, and the defendants, United States of America and Interstate Commerce Commission, from "converting the cumulative preferred stock of the intervening defendant into new common stock" until this action has been determined by the Courts.

Leon Leighton appeared for the intervening defendant, Missouri Pacific Railroad Company; and Richard Hill and Ronald L. Reisner appeared for the defendants, United States of America and Interstate Commerce Commission.

The hearing commenced at 10:00 a.m., on Wednesday,

—3—

December 4, 1974, and terminated (with lunch and recess) at approximately 3:15 p.m., on the same day.

The Court heard argument from all three pro se plaintiffs, from counsel representing intervening defendant, Missouri Pacific Railroad Company, and from counsel representing the United States of America and the Interstate Commerce Commission.

In addition to the oral arguments, the Court received, filed and studied the variously labelled submissions by all parties.

Having considered the arguments and the material submitted, the Court made the following findings:

I. The pro se plaintiffs have not carried their burden with regard to the criteria laid down by this Court for the granting of equitable relief, to wit:

A. They have not proved that they will be irreparably injured if the relief sought herein is not granted;

B. They have not proved a reasonable probability of eventual success in these proceedings;

C. They have not shown that the equities which they

—4—

advanced outweigh, on balance, the equities advanced by the defendants;

D. In the light of the plaintiffs' concession that this proceeding is not affected with the public interest there is no necessity for the court to pass on this criteria; the concession consisting of representation by all pro se plaintiffs that the interest is strictly confined to the stockholders of this railroad company;

It is therefore Ordered that the pro se plaintiffs' cross motion for injunctive relief recited above be and the same is hereby denied.

No costs to either party.

Now, that is the decision on the cross motion. You have a deadline. This is a matter of record now with the Court Reporter, and represents the Decision of this Court. Your deadline is December 14th. I think that is the right date. So it is up to you to take whatever steps you feel have to be taken.

Now, with regard—going backwards, and I won't keep you but one second. Now, going backwards, we will sign the Order that was generated out of the November 27th meeting on discovery as submitted by the Government.

Extracts from Hearing of December 4, 1974

—5—

Mr. Hill: Thank you.

Judge Hunter: Judge Whipple has reminded me, in view of the shortness of the time, the minutes of this proceeding—and you can get a copy of what was said from the Court Reporter—shall constitute the final Order of this Court on this cross motion.

Judge Whipple: No Formal Order will be submitted.

* * * * *

Order of Second Circuit Court of Appeals Dated June 12, 1973

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twelfth day of June one thousand nine hundred and Seventy-three.

Present:

Hon. Irving R. Kaufman,
Chief Judge,

Hon. J. Joseph Smith,
Circuit Judge,

Hon. Frederick vP. Bryan,
District Judge.

73-1864
73-1865

Betty Levin, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, and on behalf of said corporation and Robert LeVasseur and Alleghany Corporation,

Plaintiffs,

William R. Wesson, a Class B Stockholder in Missouri Pacific Railroad Company,

Plaintiff-Appellant,

—v.—

Mississippi River Corporation, Missouri Pacific Railroad Company, Robert H. Craft, T. C. Davis and Thomas F. Milbank,

Defendants-Appellees.

Order of Second Circuit Court of Appeals
Dated June 12, 1973

Appeal from the United States District Court
For the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed on Judge Weinfeld's opinion below, —— F. Supp. —— (S.D.N.Y. 1973).

Irving R. Kaufman
Chief Judge

J. Joseph Smith
Circuit Judge

Frederick vP. Bryan
District Judge

Order of Second Circuit Court of Appeals dated December 18, 1974

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of December one thousand nine hundred and seventy-four.

Present:

Hon. Henry J. Friendly,
Hon. William H. Timbers,
Hon. Murray I. Gurfein,
Circuit Judges.

74-2172
74-2231
74-2104

Betty Levin, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, Alleghany Corporation and Robert LeVasseur,

Plaintiff-Appellee,

—v.—

Mississippi River Corporation, Missouri Pacific Railroad Company, Robert H. Craft, T. C. Davis and Thomas F. Milbank,

Defendants,

Michael Moumousis, Napolean C. Gabriel, Jacob R. Cohen, June Cohen,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Order of Second Circuit Court of Appeals dated December 18, 1974

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the orders and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro,
Clerk.

Order of Judge Weinfeld dated March 19, 1975

3/19/75 Petitioners Motion Is Hereby Denied.

So Ordered:

Edward Weinfeld
U.S.D.J.

Order of Judge Weinfeld dated June 3, 1975

Petitioner Gabriel's motion to re-open is hereby denied. Court finds motion vexatious and orders movant to pay $100.00 counsel fees, to be divided among opposing counsel.

So Ordered

Edward Weinfeld
U.S.D.J.

Order of Second Circuit Court of Appeals Dated November 18, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of November one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge,

HON. ROBERT P. ANDERSON,
HON. ELLSWORTH VAN GRAAFEILAND,
Circuit Judges.

75-7241

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiffs-Appellees,

—v.—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants-Appellees,

JAMES C. GABRIEL,
Petitioner-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Order of Second Circuit Court of Appeals dated November 18, 1975

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed.

Gabriel appeals from Judge Weinfeld's order of March 21, 1975, denying a motion to set aside the final judgment of May 2, 1973 approving the settlement of this action. Each of the arguments posed by Gabriel has been previously raised and rejected in prior proceedings before the district court, this Court, the Supreme Court, or the Interstate Commerce Commission. No new evidence is presented to justify relief from the operation of the 1973 judgment. Fed. R. Civ. P. 60(b).

Although at this time we will not act pursuant to appellees' suggestion that costs be imposed upon Gabriel under F.R.A.P. 38, further appeals of this nature in a matter already so thoroughly litigated may justify the imposition of such a sanction.

IRVING R. KAUFMAN
ROBERT P. ANDERSON
ELLSWORTH VAN GRAAFEILAND

Order of Second Circuit Court of Appeals dated December 16, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of December, one thousand nine hundred and seventy-five.

JAMES C. GABRIEL,

Appellant,

—v.—

MISSISSIPPI RIVER CORPORATION, *et al.*,

Appellees.

A motion having been made herein by Appellant pro se for an extension of time to file a petition for rehearing and/or rehearing *en banc;* stay of the mandate pending certiorari; to require joinder of the Internal Revenue Service.

UPON CONSIDERATION THEREOF, it is

ORDERED that said motion be and it hereby is denied. DENIED.

IRVING R. KAUFMAN
Chief Judge,

ROBERT P. ANDERSON
ELLSWORTH VAN GRAAFEILAND
Circuit Judges.

Order of Second Circuit Court of Appeals dated January 7, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of January, one thousand nine hundred and seventy-six.

JAMES C. GABRIEL,

Appellant,

—v.—

MISSISSIPPI RIVER CORPORATION, *et al.*,

Appellees.

A motion having been made herein by appellant pro se for reconsideration of order of December 10, 1975 denying motion for an extension of time to file a petition for rehearing and/or rehearing *en banc;* stay of the mandate pending certiorari and to require joinder of the I.R.S.,

UPON CONSIDERATION THEREOF, it is

ORDERED that said motion be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge,

ROBERT P. ANDERSON
ELLSWORTH VAN GRAAFEILAND
Circuit Judges.

Order of Second Circuit Court of Appeals dated February 2, 1976

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of February, one thousand nine hundred and seventy-six.

James C. Gabriel,

Appellant,

—v.—

Mississippi River Corporation, *et al.,*

Appellees.

A motion having been made herein by Appellant pro se for reconsideration of order of January 7, 1976 denying motion for an extension of time to file a petition for rehearing and/or rehearing *en banc;* stay of the mandate pending certiorari and to require joinder of of the I.R.S.,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is Denied. This court will not consider any further motions for reconsideration in this appeal.

Irving R. Kaufman
Robert P. Anderson
Ellsworth Van Graafeiland
Circuit Judges.

Order of Second Circuit Court of Appeals dated March 25, 1976

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of March, one thousand nine hundred and seventy-six.

Betty Levin, *et al.,*

Appellees,

—v.—

Michael Moumousis, *et al.,*

Appellants.

A motion having been made herein by Appellants Moumousis and Gabriel for disallowal of costs

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Further ordered that costs in amount of two hundred and fifty dollars ($250) are hereby taxed against appellants Michael Moumousis and Napolean Gabriel on the instant motion, the said costs to be paid to appellees within ten (10) days of the date of this order.

Henry J. Friendly
William H. Timbers
Murray I. Gurfein
Circuit Judges.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 74-239-C (2)

LABELLE GILLESPIE,

Plaintiff,

—v.—

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Defendants,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervenor-Defendant.

JUDGMENT

The Court having this day filed its memorandum opinion which is hereby incorporated herein and made a part of this judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the orders of the Interstate Commerce Commission in Finance Docket No. 27346 with respect to the application of Missouri Pacific Railroad Company for authority under Section 20a of the Interstate Commerce Commission Act to issue securities in connection with a Plan of Recapitalization be and

the same are hereby affirmed and plaintiff's complaint is hereby dismissed at plaintiff's costs.

Dated this 14th day of November, 1974.

WILLIAM H. WEBSTER
Judge, U. S. Circuit Court

JOHN K. REGAN
Judge, U. S. District Court

J. K. WANGELAN
Judge, U. S. District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 74-239-C (2)

LABELLE GILLESPIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Defendants,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervenor-Defendant.

Before WEBSTER, Circuit Judge, WANGELIN and REGAN, District Judges.

REGAN, Judge

By this action heard to a three-judge court, plaintiff seeks to set aside and annul orders of the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act granting authority to the Missouri Pacific Railroad Company (MoPac) to issue securities in connection with a plan of recapitalization. Plaintiff is one of several MoPac stockholders who opposed the plan both before the Com-

misison and previously. We have jurisdiction under Sections 1336(a), 1398(a), 2284 and 2321-2325, 28 U.S.C.

The background of this controversy is set forth in detail both in the comprehensive 71 page report of the Commission and in Judge Weinfeld's opinion in *Levin* v. *Mississippi,* D. C. N. Y., 59 FRD 353. We briefly summarize.

MoPac is a Missouri corporation which was reorganized in 1956 under Section 77 of the Bankruptcy Act (Section 205, 11 U.S.C.). Upon reorganization, MoPac was authorized to issue two classes of $100 stated capital no par stock: Class A which was issued to former preferred stockholders and Class B issued to former common stockholders. Class A stock was preferentially entitled to non-cumulative dividends of not to exceed $5 per share annually. Each share of both classes was entitled to one vote. Class A stock, which constituted 98 per cent of the total stock, had operational control over the corporation (e.g., power to elect the Board of Directors), but in certain other important areas such as mergers, consolidations and reorganizations involving the issuance of additional stock or the alteration of rights of either class of stock, the separate consent of a majority of both classes was required, thus giving a majority of the numerically small number of Class B shares veto power over such matters. See *Levin* v. *Mississippi River Fuel Corp.,* 386 U.S. 162.

By 1963, Mississippi River Corporation (Mississippi) had acquired a majority of the Class A shares while Alleghany Corporation (Alleghany) had become the owner of a majority of the Class B shares. Thus, since 1963, Mississippi has elected MoPac's Board of Directors and Alle-

ghany exercised a veto power independent of the other Class B shareholders as to any corporate action necessitating Class B shareholder approval.

Understandably, because of MoPac's increased earnings and other factors, Class B shareholders, led by Alleghany, had become dissatisfied, to say the least, with MoPac's dividend policy of paying only $5 per share annually on Class B stock. As a result, a class and derivative action (*Levin* v. *Mississippi River Corporation*, supra) was instituted in which it was allleged, inter alia, that the defendants were parties to a conspiracy to "freeze out" Class B stockholders by various methods including the payment of unreasonably low dividends, that Mississippi had misused its majority voting power, and that defendants had breached their fiduciary duties. The major relief sought was an order compelling the payment of higher past and future dividends. The director defendants in that suit asserted that their dividend policy was justified by prudent business judgment made in good faith.

Thereafter, commencing in 1968 and continuing until the latter part of 1972, the parties to the *Levin* litigation (including Alleghany, two other minority B stockholders, Mississippi and MoPac) undertook extensive and thorough pre-trial discovery, following which a settlement was agreed upon on the basis of a restructured capitalization which would, if consummated, eliminate the underlying cause of the constant stress between Class A and Class B shareholders.

On March 19, 1973, in an exhaustive opinion, Judge Weinfeld approved the proposed settlement as fair and

reasonable, noting that "it offered a permanent solution to the long-standing impasse between the two contending groups of stockholders." 59 FRD at 373. The District Court decision was affirmed without opinion on appeal by the Second Circuit, 486 F.2d 1398, and certiorari was denied.

As summarized by Judge Weinfeld, the settlement provided for a Plan of Recapitalization and a proposed Amendment to MoPac's Articles of Association subject to its stockholders' approval to bring about the following:

> "(1) [E]ach share of Class A stock would be converted into one share of $5 cumulative preferred stock, with a liquidating preference of $100 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MoPac for $100 per share, after December 31, 1975. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;
>
> (2) each share of Class B stock would be converted into sixteen shares of new common stock and $850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MoPac of $33,771,350;
>
> (3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany—that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000; 000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac."

Thus, in addition to the required approval of the Interstate Commerce Commission for the issuance of the new shares, the recapitalization plan could not have been effected without the consent of 75 per cent of the outstanding stock of each class including a majority of the shares of each such class held by others than Mississippi and Alleghany. Substantially more than the necessary number of shares having voted in favor of the recapitalization plan, the issue before the Interstate Commerce Commission was whether it should grant its approval under Section 20a to issue the securities called for in the plan of recapitalization.

After a hearing at which all parties were accorded the right to present evidence and arguments, the Commission issued its report and order on December 14, 1973, granting MoPac's application, the order being made effective immediately in view of the deadline set forth in the settlement agreement. On December 28, 1973, the Commission denied petitions to stay the effective date of its December 14, 1973 order, and on January 23, 1974, it denied petitions for reconsideration of that order. On March 4, 1974, the Commission denied petitions seeking a finding that an issue of general transportation importance is involved. The plan of recapitalization was consummated on January 21, 1974, and this suit followed on April 2, 1974.

The amendment to MoPac's Articles of Association was made in conformity to Missouri law. MoPac's Articles of Association expressly provide that the rights of all holders of capital stock of the company are subject to change, alteration, abrogation, or repeal in any manner permitted by the laws of Missouri. And Section 388.220, R.S.Mo.,

specifically authorizes modifications of the stock structure of railroad companies such as were here made. Hence, since far more than the requisite number of shareholders of each class of stock has voted in favor of the changes, the question before the Interstate Commerce Commission on the Section 20a application was the very narrow one of whether the issuance of the new securities to effectuate the plan and amendment to the Articles of Association would be "for some lawful object within [McPac's] corporate purposes and compatible with the public interest," and would be "reasonably necessary and appropriate for such purpose."

The Commission recognized that the rights of minority stockholders are a part of the public interest, so that in determining whether the transaction was "compatible with the public interest," it was required "to see that the interests of minority stockholders are protected and that the overall proposal is just and reasonable as to those stockholders."

In reaching its conclusion that the proposed plan was in the best interest of the stockholders and the carrier and was compatible with the public interest, the Commission considered the fact that the recapitalization plan had been agreed upon after extensive arms-length bargaining between MoPac, Mississippi, and Alleghany, and approved by the court in the *Levin* case, the value per share of the Class A and Class B stock, the consideration to be paid for each share of existing stock, the evidence of the parties at the hearing, and the arguments and contentions in their briefs. In addition, consideration was given to the fact that the elimination of the veto power held by the Class B stock would have the effect of simplifying the structure of MoPac

stock and that the conversion feature of the new stock might result in the all-common stock structure. It was the opinion of the Commission that the proposed plan would provide an effective means for the payment of higher dividends, would render equity financing more feasible, would more equitably distribute the voting power among the stockholders, would eliminate the confusion between Class A and B stockholders and would thereby enable McPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads.

The principal contention of plaintiff and other minority Class B stockholders to the effect that the recapitalization plan unlawfully deprived them of a substantial portion of the full value of their Class B stock. In large part, the protestants, including plaintiff, argued that the Class B stock, at the minimum, should have been valued at "book value" ($9000 per share) if not at a higher up-dated valuation in excess of that figure.

The claim was considered at length by the Commission in light of the pertinent evidence. In rejecting "book value" as the measure of the actual value of the Class B stock, the Commission held that bookkeeping entries evidencing "book value" are of little significance in measuring the actual value of a going company such as MoPac. Instead, based on the testimony of expert witnesses, the Commission utilized the capitalized earnings method, as the result of which it held that the Class B shareholders would in fact receive "value for value." See in this connection the enlightening decision in *Levin* v. *Mississippi River Corporation,* supra, 59 FRD 1c 369ff; *Schwabacher* v. *United States,*

334 U.S. 182; and *Borg* v. *International Silver Company*, 2 Cir., 11 F.2d 147, 152.

Other contentions of plaintiff, rejected by the Commission, included: (1) that an "immutable" contract was created by the 1956 plan of reorganization which could not be altered over the dissent of a single Class B shareholder; (2) that the settlement plan approved by Judge Weinfeld has a "congenital defect" in that the *Levin* suit for dividends was "illegally" converted into a suit for recapitalization; (3) that the settlement plan was "forced" upon the Class B shareholders by "court fiat;" (4) that the proxy statement for the stockholders' meeting was false and misleading; and (5) that MoPac, Mississippi, and their respective boards' directors were guilty of conspiracy, fraud and deceit.

We agree that the Commission's findings on these issues were warranted. So, too, we find no merit to plaintiff's further assertion that Alleghany "sold out" the other Class B stockholders by entering into the settlement agreement. As the Commission noted in its report: "Alleghany as the majority owner of the Class B stock has spent considerable sums of money over the years to protect its interest. It is the party to the agreement that has the most to gain and the most to lose. Under the circumstances, there is little or no likelihood that Alleghany would agree to surrendering its stock for less than fair value. Besides all the evidence of record contraindicates that Alleghany agreed to accept less than fair value."

Our sole function in this proceeding is to determine whether the orders of the Commission are supported by substantial evidence on the whole record and do not in-

volve an error of law. *Norfolk & Western Railway Co.* v. *United States*, D. C. Mo., 316 F.Supp. 1396, 1399. In our judgment, the Commission applied correct legal standards in its consideration of the application and its ruling thereon. The evidence before the Commission, which is summarized in its report and which need not be here repeated, amply supports the order granting MoPac's application. Accordingly, judgment will be entered affirming the orders of the Commission and dismissing the complaint.

Dated this 14th day of November, 1974.

William H. Webster
Judge, U. S. Circuit Court

John K. Regan
Judge, U. S. District Court

H. Kenneth Wangelin
Judge, U. S. District Court

A True Copy of the Original

Nov. 14, 1974
Martin A. Shapiro

Deputy Clerk
Nov. 18, 1974

Order of Judge Bryan

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 5095

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiffs,

—against—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS MILBANK,

Defendants.

Plaintiffs Betty Levin and Alleghany Corporation having moved this Court for an order pursuant to Rule 23(c) and (d), Federal Rules of Civil Procedure, determining that this action may be maintained as a class action and directing that notice be given to the class in such manner as the Court may direct, and said motion having come on to be heard on September 24, 1968,

Now, upon the pleadings on file and the affidavits submitted on said motion, and after hearing Richard L. Bond, Esq., for plaintiff Alleghany Corporation, and Sheldon H. Elsen, Esq., for plaintiff Betty Levin, in support of said motion, and Michael M. Maney, Esq., for defendants Missouri Pacific Railroad Company, Robert H. Craft, T. C.

Davis and Thomas Milbank, in opposition to said motion, and due deliberation having been had, and

It appearing from the foregoing papers that there is no dispute that at the present time there are approximately 1,200 holders of Class B Stock of Missouri Pacific Railroad Company, that the plaintiffs presently before the Court are the owners of a majority of the outstanding Class B stock, and that this action meets the requirements of a class action under Rule 23(a), (b)(1) and (b)(2) of the Federal Rules of Civil Procedure, it is hereby

ORDERED that the motion by plaintiffs Betty Levin and Alleghany Corporation to determine that this action may be maintained as a class action be and it hereby is granted; and it is further

ORDERED that this action is determined to be a class action within the provisions of Rule 23(a), (b)(1) and (2), Federal Rules of Civil Procedure, and that the members of said class are all Class B stockholders of Missouri Pacific Railroad Company; and it is further

ORDERED that, pursuant to Rule 23(d), Federal Rules of Civil Procedure, notice of the pendency of this action substantially in the form annexed to this order be mailed to all registered holders, as of October 15, 1968, of Class B stock of the Missouri Pacific Railroad Company; and it is further

ORDERED that, within 10 days of the entry of this order, plaintiffs Betty Levin, Alleghany Corporation and Robert LeVasseur shall deliver to defendant Missouri Pacific Railroad Company a sufficient number of printed notices in

Order of Judge Bryan

envelopes for mailing to each registered holder of Class B stock of the Missouri Pacific Railroad Company, and defendant Missouri Pacific Railroad Company shall cause a copy of said notice to be mailed to each registered holder of Class B stock of the Missouri Pacific Railroad Company, as determined by the stock transfer records of said company, within 5 business days after receipt from plaintiffs of said printed notices in envelopes; and it is further

ORDERED that the reasonable expenses of said mailing shall be borne jointly and severally by the plaintiffs; and it is further

ORDERED that defendant Missouri Pacific Railroad Company shall file an affidavit of mailing with the Court promptly after the aforesaid mailing, which affidavit shall contain the name and address of each person to whom the notice was mailed; and it is further

ORDERED that any member of the class desiring to intervene in this action must, no later than December 2, 1968, give notice of intention to intervene in the manner set forth in the appended Notice, and thereafter must, no later than December 20, 1968, either obtain the consent of all parties to said intervention or serve notice of motion for leave to intervene.

Dated: New York, New York
October 9, 1968

/s/ FREDERICK vP. BRYAN
Frederick van Pelt Bryan
U.S.D.J.

Order and Final Judgment of Judge Weinfeld

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civil 5095 (EW)

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiffs,

—against—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants.

The parties to this action having submitted to the Court for its approval, pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, a Stipulation of Settlement dated December 18, 1972; and

By Order dated December 20, 1972, the Court having directed that a hearing be held on January 25, 1973, to determine whether the terms and provisions of the Stipulation of Settlement were fair, reasonable, adequate and proper and should be approved, and to determine whether final judgment should be entered in accordance with the Stipulation of Settlement and having directed that notice of the settlement hearing be given to the MoPac stockholders in a manner specified in the order; and

Notice of the hearing having been given to the stockholders in accordance with the order of December 20, 1972, it having been mailed, on December 27, 1972, to all stockholders of record of defendant Missouri Pacific Railroad Company, as of the close of business on December 26, 1972, and it having been published in the national edition of *The Wall Street Journal* on December 27, 1972; and

On January 25, 1973, a hearing having been held to determine whether the proposed settlement embodied in the terms and provisions of the Stipulation of Settlement should be approved and at that hearing an opportunity having been provided for all proponents of and objectors to the proposed settlement to be heard and to submit papers for the consideration of the Court; and

The Court having considered the prior proceedings in this action, and the matters submitted to it, and after due deliberation having rendered an opinion on March 19, 1973, and having determined that a final judgment should be entered; it is hereby

Ordered, Adjudged and Decreed:

1. That the terms and provisions of the Stipulation of Settlement dated December 18, 1972, are fair, reasonable, adequate and proper to the Missouri Pacific Railroad Company and to the members of the class consisting of all of its Class B stockholders, and the same are hereby approved, as per the opinion of the Court dated March 19, 1973.

2. That the notice to the stockholders of the hearing was fair, adequate and sufficient and constituted compliance

with Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure.

3. That any and all objections to the terms and provisions of the Stipulation of Settlement are hereby overruled.

4. That the parties to the Stipulation of Settlement are hereby authorized and directed to consummate the settlement of this action pursuant to the terms and provisions of the Stipulation of Settlement.

5. That thereupon the Complaint and Amended Complaint of Betty Levin, the Complaint and Amended Supplemental Complaint of Alleghany Corporation, and the Complaint of Robert LeVasseur are hereby dismissed as against all defendants on the merits, with prejudice and without costs to any party.

6. That the Court retains jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purpose of entertaining applications for attorneys' fee. and expenses by counsel for plaintiffs Betty Levin and Robert LeVasseur and by plaintiff Alleghany Corporation.

Dated: New York, New York
May 2, 1973

Edward Weinfeld
U.S.D.J.

Judgment entered:

May 2, 1973

Thomas E. Andrews
Acting Clerk

Extracts from Commission Record

a. Supplement to Application, Exhibit Item 8(b)(2), p. 2 (Voting of Proxies)

VOTING

Unless otherwise specified, proxies received by the Company will be voted "FOR" the Plan. If a stockholder has appropriately specified how the proxy is to be voted, it will be voted in accordance with such specification. A stockholder may revoke his proxy at any time before the proxy is voted.

b. Hearing Exhibit 4, p. 78
Tabulation of Votes at Special Meeting on June 15, 1973

MOPACRC Page 78

THE BOATMEN'S NATIONAL BANK
OF ST. LOUIS

	Shares voted				*Vote Instructed*	
Stockholder	*For*	*Against*	*Number*	*Shares*	*Yes*	*No*
Vernon E. Ryther & Johanna Ryther JT Ten 4710 North Highway 140 Florissant Mo 63033			694	17		
Charles W. Saacke Jr 2601 Lindsey Ave N3 Louisville Ky 40206	1		695	1	√	
Marily R. Saacke 253A Agawam Dr Stratford Conn 06497			696	1		
Sabatco C/O Trust Dept Southern Arizona Bank & Trust Company P. O. Box 1871 Tucson Ariz 85702	10		697	10		√
SAF Co. Franklin National Bank C/O Corporate Trust Dept 130 Pearl St New York N Y 10015	21243		698	21243		√
Samuel Salvatore 74 Kenilworth Street Waterbury Conn 06710		5	699	5		
Michael M. Sapounakis 679 W 239 St Riverdale Bronx N Y 10463		5	700	5		
Moschos P. Sapounakis 679 W 239 St Riverdale N Y 10463		5	701	5		
Paul M. Sapounakis 679 W 239 St Riverdale N Y 10463		5	702	5		

NOS. 76-405 AND 76-443

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES C. GABRIEL, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

WILLIAM R. WESSON AND JOHN CHARLES VAIANI, APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,

DONALD I. BAKER,
Assistant Attorney General,

CARL D. LAWSON,
Attorney,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

CHARLES H. WHITE, JR.,
Associate General Counsel,

HANFORD O'HARA,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-405

JAMES C. GABRIEL, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 76-443

WILLIAM R. WESSON AND JOHN CHARLES VAIANI, APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals from the final judgment of a three-judge district court (Gabriel J.S. App. 2a-8a; 416 F. Supp. 810) affirming an order of the Interstate Commerce Commission (347 I.C.C. 377). The Commission

found, pursuant to Section 20a of the Interstate Commerce Act, as added, 41 Stat. 494, 49 U.S.C. 20a, that the issuance of securities by the Missouri Pacific Railroad Company ("MoPac") as part of a plan of recapitalization was "for a lawful object within the corporate purposes" of the carrier, "compatible with the public interest," and "reasonably necessary and appropriate for such purposes" (347 I.C.C. at 418). This plan of recapitalization implemented the settlement of a class action brought by holders of Class B MoPac stock. *Levin* v. *Mississippi River Corp.*, 59 F.R.D. 353 (S.D. N.Y.), affirmed *sub nom. Wesson* v. *Mississippi River Corp.*, 486 F. 2d 1398 (C.A. 2), certiorari denied, *sub nom. Wesson* v. *Levin*, 414 U.S. 1112. Appellants are dissatisfied members of that class.

The three-judge district court held that the Commission's approval of the issuance of securities in connection with the recapitalization plan was a valid exercise of its power under Section 20a and that the Commission's decision was based upon adequate findings in light of the evidence (Gabriel J.S. App. 8a). The court rejected appellants' contention that the Commission's order unlawfully deprived Class B stockholders of the value of their stock, and endorsed the Commission's conclusion that "book value cannot be the measure of fair value of stock; rather, earnings must be considered and the capitalized earnings method is the proper means of analysis" (Gabriel J.S. App. 7a).[1]

[1] In a separate suit challenging the same Commission order, another three-judge district court reached the same conclusion, *Labelle Gillespie* v. *United States, et al.*, Civil Action No. 74-239 C(2) (E.D. Mo.) (unreported opinion and judgment filed November 14, 1974).

ARGUMENT

The decision of the district court is correct, and these appeals present no substantial question warranting plenary consideration by this Court.

Appellants' complaint appears to be that the Commission's valuation of the Class B MoPac stock unlawfully deprived them of the value of that stock. This assertion is contrary to the law and the evidence and has been consistently rejected by the Commission and the courts, both in the context of the dispute over the recapitalization of MoPac and elsewhere.

As the district court observed, the Commission, in the performance of its narrowly limited function under Section 20a, approved MoPac's issuance of securities upon a finding, *inter alia*, that the allocation of new shares for old was "reasonable and fair in view of the present and prospective worth of MoPac" (Gabriel J.S. App. 7a). The Commission noted that MoPac, in its application for approval of the issuance of securities, had calculated the value of the old shares according to the capitalized earnings method and not, as appellants assert to be correct, according to the book or equity value of the stock (347 I.C.C. at 413). The Commission accepted the capitalized earnings valuation, stating that "class B stockholders are receiving value for value based upon recognized methods of valuation and that book or equity value has little or no significance in the evaluation of stock" (*ibid.*).

This conclusion is consistent with prior decisions of this Court, lower federal courts and the Commission. As this Court stated in *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 483: "There is no more important element in the valuation of commercial properties than earnings." See also *Schwabacher* v. *United States*, 334 U.S. 182, 199;

Consolidated Rock Products Co. v. *DuBois,* 312 U.S. 510, 525-526; *Boston & M. R. Securities Modification,* 275 I.C.C. 397, 431-433. "The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious." *Borg* v. *International Silver Co.,* 11 F. 2d 147, 152 (C.A. 2). See also *Levin* v. *Mississippi River Corp., supra,* 59 F.R.D. at 370.

The Commission satisfied its obligation to ensure that minority interests are protected. See *Schwabacher* v. *United States, supra,* 334 U.S. at 201. Appellants and their co-holders of Class B MoPac stock received value for value. They were entitled to no more. As the Commission observed, the book value of the stock was a "potential value on liquidation which * * * can rarely, if ever, be realized" (347 I.C.C. at 413). Fairness to the minority stockholders was also ensured by the provision in the recapitalization plan requiring that the plan be approved not only by 75 percent of the shareholders of each class of stock, but also by a majority of the minority stockholders of each class.

Appellants are seeking to impose upon the financial structure of the railroad an obligation to which they are not entitled. *Schwabacher* v. *United States, supra.* Their claim was properly rejected by the court in *Levin* v. *Mississippi River Corp., supra,* by the Commission, and by the court below.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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